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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IBP, INC.,

Petitioner,

v.

HUGHES A. BAGLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Petition Clause of the First Amendment provide any protection from libel law to those who petition the Congress? Or is the only constitutional protection from a suit for libel arising from an act of petitioning the Congress that afforded by the Speech and Press Clauses (and thereby solely dependent upon whether the particular plaintiff is a public or private figure)?

II. Did the Eighth Circuit apply an impermissible test that conflicts with other circuits and with this Court's decisions to determine whether Bagley is a limited purpose public figure?

III. Did the Eighth Circuit err under *Bose* in failing to conduct an independent review of the trial record to determine whether there was clear and convincing evidence of actual malice, and by an apparent failure to conduct an independent review to determine whether the plaintiff was a limited purpose public figure?

IV. May First Amendment guarantees be vitiated by permitting the jury repeatedly to hear highly inflammatory evidence about the defendant that is of no probative value or relevance and that necessarily so inflames the jury that any First Amendment or *New York Times* jury instructions will almost certainly be disregarded?

V. Does the district court's systematic abuse of the trial process amount to a Due Process violation such that the tortious interference judgments below cannot stand?

PARTIES

The caption of the case in this Court contains the names of all parties. Petitioner IBP, inc. is a wholly-owned subsidiary of Occidental Petroleum Corporation.

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HUGHES A. BAGLEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner IBP, inc., formerly Iowa Beef Processors, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 11, 1986.

OPINIONS BELOW

The July 24, 1986 opinion of the *en banc* United States Court of Appeals for the Eighth Circuit (Petition Appendix (hereinafter "P.A.") A) is reported at 797 F.2d 632 (8th Cir. 1986). The prior Eighth Circuit panel opinion dated February 13, 1985 (P.A. C) is reported at 755 F.2d 1300 (8th Cir. 1985). The September 11, 1986 Order of the *en banc* Eighth Circuit denying IBP's petition for rehearing (P.A. B) is not reported.

The underlying judgment (P.A. D) and opinion denying IBP's motion for judgment notwithstanding the verdict (P.A. E) of the United States District Court for the Northern District of Iowa, Western Division are not reported.

JURISDICTION

This petition for writ of certiorari seeks review of the following judgments and decisions:

(i) Judgment, entered December 30, 1982, at 12:50 p.m., on a jury verdict, and order denying motion for

judgment notwithstanding the verdict or for a new trial entered on June 24, 1983 in No. 79-4087 in the United States District Court for the Northern District of Iowa, Western Division (P.A. D & E);

(ii) Decision, filed February 13, 1985, on appeal in No. 83-1894 to the United States Court of Appeals for the Eighth Circuit (P.A. C);

(iii) Decision, filed July 24, 1986, on hearing *en banc* by the Eighth Circuit (P.A. A);

(iv) Order, filed September 11, 1986, denying rehearing by the *en banc* Eighth Circuit (P.A. B).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This petition squarely raises the issue of accommodating the common law of libel with the First Amendment right to petition Congress. The case also presents for decision the correct reading of this Court's opinion last year in *McDonald v. Smith*, 105 S. Ct. 2787 (1985), as well as the precedential applicability of *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), to the Petition Clause. The Eighth Circuit is so badly fragmented as to its reading of *McDonald v. Smith* that in its *en banc* opinion denying rehearing *en banc* Judge Richard Arnold and three other members of the Eighth Circuit expressed the hope that this Court would now review the case. (The Eighth Circuit rendered a panel opinion, an *en banc* opinion and an opinion

denying rehearing *en banc*; in each instance a dissenting opinion was also filed.)

The Controversy Below and The Eighth Circuit Rulings

The cause arose when the Subcommittee on General Small Business Problems of the U.S. House of Representatives Committee on Small Business ("the Subcommittee") began an investigation of the meat packing industry to ascertain whether new legislation was necessary to protect competition. (P.A. A at 2.) Hearings began in October 1977 and were held intermittently through July 1979. At some point during this period, the Subcommittee's inquiry began to focus specifically on petitioner IBP, inc. ("IBP"), the largest company in the industry.[1] By the summer of 1979 IBP had unquestionably become the prime target of the Subcommittee. (P.A. A at 3 and 14; P.A. C at 8-9.)

In June of 1979, as the Subcommittee was preparing for another of a series of hearings that were to take place in July, the Subcommittee Chairman, Congressman Neal Smith (D-Iowa), wrote to IBP's president, Robert Peterson, on behalf of the Subcommittee. (P.A. A at 4; P.A. C at 7.) The Smith letter, in part, read:

> I wish to take this opportunity to offer you or any other officer who has personal knowledge of the firm's activities and who can speak on behalf of Iowa Beef Processors the opportunity to voluntarily appear and testify before the Subcommittee. Such a hearing would be conducted pursuant to the Rules of the Committee on Small Business, a copy of which is included with this letter. Essentially, the witness or witnesses appearing

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[1] Defendant IBP is a Delaware corporation with its principal place of business in Nebraska. Plaintiff Hughes A. Bagley ("Bagley") is a citizen of Iowa, and the amount in controversy exceeds $10,000.00. Federal jurisdiction in the court of first instance was predicated upon diversity of citizenship. 28 U.S.C. § 1332 (1982).

> on behalf of Iowa Beef Processors would have the opportunity to appear under oath and present a written statement of reasonable length which would be made a part of the Subcommittee's hearing record. Following the submission of this written statement and an oral presentation of reasonable length, the witness or witnesses appearing on behalf of Iowa Beef Processors would be questioned by members of the Subcommittee.

The letter went on to make clear that IBP was the principal target of the Subcommittee's inquiry:

> [T]he questions can be expected to cover a broad range of topics and issues pertinent to the Subcommittee's inquiry[,] . . . includ[ing] matters raised by the so-called "Bagley documents," the reported expansion efforts of IBP into the Western portion of the United States, matters involving the labor and transportation practices and relationships of IBP, activities of IBP in the areas of meat pricing and cattle futures, the procurement practices of IBP in obtaining live cattle for slaughter and other possible topics . . . .
>
> *As you know, a great deal of testimony received by this Subcommittee has been in regard to Iowa Beef Processors. If new legislation or rules are enacted to limit dominance by any companies in the meat industry or to ensure that enough competition remains in the industry to prevent undesirable economic consequences, it is clear that Iowa Beef Processors will be one of the companies most affected.*

(P.A. A at 5-6; P.A. C at 8-9 (emphasis added).)

The letter's reference to "the so-called 'Bagley documents' " relates to several thousand pages of internal IBP business records that Bagley, the plaintiff and a former vice president for retail sales development of IBP, had taken with him when he left the company's employ in July of 1975. (P.A. A at 3.) The documents included IBP weekly profit and loss statements, monthly production and sales

reports, confidential legal memoranda, president's staff meeting reports, data concerning customers and their purchasing behavior, and memoranda outlining the company's goals, marketing strategies and pricing formulas.[2] (P.A. A at 3; P.A. C at 5.) After leaving IBP, Bagley shared his cache with attorneys who represented (and also with other attorneys who were looking to represent) plaintiffs in antitrust litigation against IBP. (P.A. C at 6.)

The Subcommittee heard testimony at its July 1979 hearings from only one witness—Bagley. (P.A. C at 9.) In a prepared opening statement, Bagley began by accusing IBP of attempting to " 'monopolize the packing industry,' " and declaring that he had shared the documents with the antitrust lawyers who were acting against IBP because he " 'could see that somebody somehow had to stand up and be counted, or IBP was going to swallow up all of its smaller competition.' " He said that he "'felt that [the lawyers] might be a starting point of my becoming involved in at least trying to prevent a massive takeover by IBP of the packing industry.' "[3] (P.A. C at 9.)

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[2] Subsequent to leaving IBP Bagley also obtained some additional documents containing IBP production figures and documents generated by IBP's formula pricing committee from Charles Overstreet and Hans Aarsen, two other former IBP employees. The Subcommittee's reference to "the so-called 'Bagley documents' " apparently includes those documents as well as the ones Bagley took with him when he left IBP. (P.A. C at 5 and n.8.)

[3] Bagley's other efforts to prevent what he characterized as an impending "massive takeover by IBP of the packing industry" included appearing on a television documentary about bigness in the food industry (Tr. 510-511; IBP Exhibit (hereinafter "IBPX") 105a; Bagley Dep. 532-535), moving for and obtaining a court order partially lifting a protective order so as to permit him to make the documents he had taken from IBP available to the Subcommittee (P.A. A at 4), and spending eight days giving information informally to Subcommittee staffers prior to appearing as the sole

(footnote continued on next page)

Bagley's testimony before the Subcommittee at the July hearings included numerous sensational claims of misconduct on the part of IBP. The most important of those allegations for purposes of the present action dealt with a discount that IBP had offered its customers in 1975 on a product called "Cattle-Pak." Bagley charged that the discount was in fact a continuation of an earlier quantity discount program that had been discontinued in 1973 when IBP began to doubt that it could be cost-justified. (P.A. A at 6.)

IBP did not offer a witness to testify before the Subcommittee, and the Subcommittee did not subpoena any IBP officers or personnel. IBP did, however, send a written response to the Chairman and members of the Subcommittee after the July hearings had been completed, urging the Subcommittee not to take action against IBP. (P.A. F.) IBP's communication to the Subcommittee charged that the Chairman had "chosen only those witnesses [such as Bagley] bearing particular grudges against IBP," (P.A. F at 8) and had otherwise "manipulate[d] the Subcommittee proceedings" (P.A. F at 44) and transformed them from a search for the truth into a "one-man vendetta" against IBP. (P.A. F at 43.) IBP explained that it had declined to send a witness to testify before the Subcommittee because it believed that due to the Chairman's "demonstrable prejudice" against IBP, the company would not have received a fair hearing. (P.A. A at 7; P.A. C at 10.)

IBP's submission appealed to the "open-minded members of [the] Subcommittee, the media, the cattle and beef industry, and the public . . . ." The document specifically rebutted each of the charges that had been leveled against IBP by Bagley, as well as a number of charges made against IBP by others during the two years of Subcommittee hearings. In the course of so doing, the credibility of the witnesses who had testified against IBP were challenged, including its perceived chief accuser, Bagley. Bagley was specifically

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witness ("subpoenaed") at the July, 1979 hearings. (Tr. 478-483; IBPX 88 at 6-19 and 49-59.)

charged with stealing IBP business records and with perjuring himself before the Subcommittee in respect to his testimony about the Cattle-Pak discount program. (P.A. A at 7-8 and 14; P.A. C at 11-13.)

Bagley subsequently brought this action against IBP alleging that he had been libelled by IBP's communication to the Subcommittee.[4] The district court, after a jury trial, entered judgment for compensatory and punitive damages on the libel claim in the amount of $6 million.[5]

The libel claim was based upon the charges in the submission of stealing documents and perjury before the Subcommittee. (P.A. A at 9.) The trial court instructed the jury that the two statements complained of were libelous *per se* under Iowa common law, and accordingly Bagley was not required to prove that the statements were false, but rather IBP bore the burden of proving that they were true. (P.A. A at 10.)

On appeal, a divided panel of the Eighth Circuit held that instruction to have been error, reversed the judgment on the libel count and remanded it to the district court. (P.A. C at 29-31 and 35-36.) The panel ruled that the IBP response to the Subcommittee was petitioning activity protected by the First Amendment (P.A. C at 14-17), and that because of that activity Bagley was "analogous to a limited public figure in the context of petitioning the government." (P.A. C at 28.) The panel held that Bagley would therefore be required to prove *New York Times* "actual malice" by clear and convincing evidence in order to recover even compensatory damages in any retrial. (P.A. C at 25-30.)[6] Judge George Fagg dissented from the decision and would have affirmed the whole $9.33 million judgment.

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[4] Bagley's suit also included counts alleging tortious interference with present employment and tortious interference with prospective employment. (P.A. A at 2.) The tortious interference with present employment claim is discussed in the text, *infra*.

[5] The district court also entered judgment in the amount of $650,000 on the interference with present employment claim, $350,000 on the interference with prospective employment claim, and $2.33 million in prejudgment interest. Bagley's total award was thus $9.33 million. (P.A. C at 2.)

[6] The panel majority declined to conduct an independent review of the record to determine for itself whether clear and convincing

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The Eighth Circuit then reconsidered the case *en banc*. Judge Fagg wrote the opinion for the 6 to 3 *en banc* majority which held, as had the panel majority, that the jury instructions improperly relieved the plaintiff of the burden of proving falsity. (P.A. A at 25-27 and 31.) After an extensive examination of the question the *en banc* majority further ruled, as had the panel majority, that IBP's response to the Congressional Subcommittee constituted genuine petitioning activity protected by the Petition Clause of the First Amendment. (P.A. A at 12-15.)

However, the *en banc* majority held that notwithstanding its determination that the IBP communication was protected by the Petition Clause, imposition of the actual malice standard upon Bagley for the recovery of compensatory damages nevertheless depended solely upon whether Bagley was a public or private figure (P.A. A at 16-19); the petitioning activity was not a relevant factor—only Bagley's particular status. The *en banc* majority found Bagley to be a private figure despite his extensive post-employment involvement in the controversy over the adequacy of competition between IBP and others in the meat industry. (*Supra*, at 5 and note 3.) The *en banc* Court therefore remanded with instructions that in the new trial the *New York Times* actual malice standard was not applicable to Bagley.[7] (P.A. A at 19-27 and 30.)

Judges Bright and Arnold, who had been the panel majority, dissented. Joined by Judge McMillian, the dissenters wrote that for the reasons set forth in the panel majority opinion, the *New York Times* standard had to be met for Bagley to obtain even compensatory damages. (P.A. A at 31-32, Bright, J., McMillian, J. and Arnold, J., concurring in part and dissenting in part.)

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evidence of actual malice sufficient to permit a retrial existed, but instead remanded the libel count to the district court with instructions that that court conduct such a review and that it permit a retrial only if the district court first satisfied itself that sufficient evidence of actual malice existed. (P.A. C at 30-31.)

[7] The *en banc* majority held that because it had found Bagley to be a private figure, it was not required to conduct an independent *Bose* review of the record. (P.A. A at 27.)

IBP filed a petition for rehearing, arguing that the *en banc* Court had "grievously misread" this Court's opinion in *McDonald v. Smith*, 105 S. Ct. 2787 (1985), in holding that notwithstanding IBP's petitioning activity the imposition of the actual malice standard upon Bagley was solely dependent upon his status as a public or private figure. The *en banc* Court denied the petition for rehearing, in an opinion that adhered to the view that even though petitioning was involved here the actual malice standard for recovery of compensatory damages applied *only* if Bagley was a public figure. (P.A. B at 2.)

A four judge minority,[8] in an opinion written by Judge Arnold, dissented. Judge Arnold wrote, in part:

> I respectfully dissent from the denial of the petition for rehearing.
>
> Ordinarily, I would be content with the dissenting opinion previously filed by Judge Bright, in which Judge McMillian and I joined. The Court en banc has ruled, after full consideration, and there is not much point in pursuing the matter further in this Court (though the Supreme Court may find the case interesting, and I hope it does). I write separately at this time simply to take note of the point made in the petition for rehearing: that *McDonald v. Smith*, 105 S. Ct. 2787 (1985), establishes that "*whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication and not the *status* of the defamation plaintiff is the touchstone." This summary of *McDonald*, which I have quoted from page 1 of the petition for rehearing, is, in my view, correct.

(P.A. B at 3-4 (Arnold, J., dissenting) (emphasis in the original).)

The Libel "Evidence" Below

As part of Bagley's evidence of libel and in his case in chief he was permitted to introduce, over objection, evidence of numerous alleged past wrongs unrelated to the alleged

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[8] Judges Arnold, Bright, McMillian and McGill.

libel that Bagley claimed had been committed by IBP. The evidence allowed before the jury by the trial court included:

(1) testimony that IBP and its former (and by then deceased) chairman had been convicted of conspiracy to bribe union officials five years before the alleged libel (Tr. 272, 571-580, 1579, 1593-1594, 1706-1707; IBPX 88 at 12-13, 16-17, 47-49);

(2) testimony that IBP had "Mafia connections" (Tr. 1785, 1740-42, 1709-1710, 1744, 1763, 1768, 2145);

(3) testimony that IBP had threatened plaintiffs in certain antitrust litigation against IBP and refused to buy their cattle unless they withdrew from the lawsuit (Tr. 379-381);

(4) testimony that IBP had engaged in anti-union tactics and "was looking for a strike in order to destroy the [meat cutters] union" (Tr. 428-431, 1743-1745);

(5) testimony that IBP was being investigated for "tampering with a government witness" (Tr. 1830-1831);

(6) testimony that IBP had engaged in unlawful price discrimination (Tr. 87-88, 256-272, 287-295, 948, 1425-1426, 1576-1578, 2139);

(7) testimony that IBP had engaged in below-cost predatory pricing (Tr. 462-465, 410-414, 946-947, 2211; Bagley Exhibit (hereinafter "BX") 16); and

(8) testimony that IBP's former chairman had threatened the wife (as well as the new company) of a former IBP officer, and had otherwise consistently mistreated IBP personnel (Tr. 1046-1047; 933-935).

In addition, the entire 31-page IBP submission to Congress containing IBP's rebuttal of numerous other allegations of wrongdoing unrelated to the issues in the case was presented to the jury. Then Bagley's counsel was permitted to tell the jury at closing argument that even more was known about IBP's alleged wrongful activities that the jury had not been told. (Tr. 2209.)

Petitioner argued below that such evidence and argument, even if the instructions to the jury had been correct, strong and clear, necessarily inflamed the jury. The result was to

preclude any verdict save for the plaintiff, thereby effectively undercutting First Amendment and *New York Times* guarantees. (Brief for Appellant at 59-64.) Both the panel and the *en banc* Court were troubled by the introduction of such evidence to the jury,[9] but left unclear whether this evidence could be introduced on retrial.[10]

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[9] The panel wrote:

"We reject IBP's contention that the trial court's admission of evidence deprived it of a fair trial. We do not believe that the closing argument presented by Bagley's attorney so exceeded proper bounds as substantially to affect the fairness of the trial as a whole. Our affirmance on this issue, however, is not binding on remand. The previous trial and now this appeal have, in our view, crystallized the issues in this case. It may well be that on retrial the district court will find it expedient to reconsider the probative value of particular pieces of evidence and once again determine whether that value is outweighed by the danger of unfair prejudice."

(P.A. C at 33.)

The *en banc* Court wrote:

"We also have no need to address IBP's various evidentiary challenges. We do note, however, that the rulings challenged by IBP, even if erroneous, were not so prejudicial as to deny IBP a fair trial and require the reversal of Bagley's other judgments. On retrial of Bagley's libel claim, IBP is free to challenge again the Court's rulings, and, in light of the relatively narrow issues to be tried, the district court should consider not only whether this evidence is relevant to the issues being tried but also whether the probative value of these various pieces of evidence is sufficient to outweigh their potentially prejudicial effect."

(P.A. A at 27-28.)

[10] Both the panel and *en banc* opinions affirmed Bagley's judgment for tortious interference with present employment (with some modification of the calculation of prejudgment interest), notwithstanding the Eighth Circuit's discomfort with the admission of the inflammatory evidence and argument to the jury. (P.A. C at 31-35; P.A. A at 28-30.)

REASONS FOR GRANTING THE WRIT

I.

THE DISSENTERS BELOW WERE CORRECT THAT THE EIGHTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISION IN *McDONALD v. SMITH*

All six Eighth Circuit opinions hold that IBP's communication constitutes genuine petitioning activity protected by the Petition Clause. (P.A C at 14-17; P.A. C at 36; P.A. A at 12-16; P.A. A at 31; P.A. B at 1-3; P.A. B at 3-4.) The *en banc* Court held, however, that an exercise of the petitioning right in and of itself provides *no* privilege whatsoever from a libel suit. The only constitutional protection potentially available to IBP was held to be that provided to *all* speech—*i.e.*, the constitutional privilege that hinges upon whether the particular plaintiff's status is public or private. (P.A. A at 16-19.) The Eighth Circuit ruled that because Bagley is a private figure, IBP was not entitled to the benefit of the actual malice standard for compensatory damages. (P.A. A at 19-25.)

The Eighth Circuit's holding that there is no constitutional privilege for petitioning *qua* petitioning renders the Petition Clause meaningless in a suit that claims libel from the act of petitioning; historically, a favorite tool to suppress petitioning has been a threat of a charge of libel. But nevertheless, under the Eighth Circuit's holding, petitioning by a private person is in fact given no greater libel protection than is given to speech about private persons. We believe such a denigration of the petition clause is wrong. The dissenting judges below were correct that the Eighth Circuit's holding conflicts with *McDonald v. Smith*, 105 S.Ct. 2787 (1985), and in their tacit urging of this Court to hear the case. Additionally, we believe that the Eighth Circuit's decision is at loggerheads with at least three hundred years of common law history and the constitutional struggle to secure the right to petition without fear of punishment.

In *McDonald* this Court briefly reviewed the history of the petitioning privilege, and held that petitioning is entitled to its own constitutional privilege against libel for its exercise. *McDonald* held the *New York Times* "actual malice" standard to be the appropriate measure of constitutional protection for petitioning; the opinion assumed that the actual malice stan-

dard is constitutionally required in all petitioning cases.[11] Indeed, it is clear from the history and legal precedents cited in *McDonald* that the constitutional privilege arises because of the *act of petitioning*, and not because the subjects of the petition are public figures.[12]

As *McDonald* teaches, a watershed in establishing the right to petition is the English Bill of Rights of 1689, a document exacted from William and Mary upon their succession to James II's throne. In 1688, James II had suspended an Act of Parliament that placed restrictions on Catholic subjects and required that the King's suspension proclamation be read from all pulpits. The Archbishop of Canterbury and six other prominent Protestant bishops petitioned James to be relieved of that obligation, arguing in their petition to the King that his suspension of an Act of Parliament was illegal. The King, angered at the petition, ordered the seven Bishops to be imprisoned in the Tower and tried for seditious libel for the content of their petition. At their trial the Bishops argued that they could not be held liable because they had a right to petition the King and that was all they had done. As one of the defense counsel summed up, "[I]f this should be a libel, I know not how sad the condition of us all would be, if we may not petition when we suffer." *Trial of the Seven Bishops*, 12 Howell's State Trials 183, 395 (1688).

The Bishops were acquitted, but the fact that they had even been brought to trial became a major catalyst for the Glorious Revolution that resulted in James II being succeeded by William and Mary and the right to petition becoming a part of the 1689 Bill of Rights. Presser, *Seven Bishops'*

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[11] The plaintiff in *McDonald* was seeking to be appointed a United States Attorney, *McDonald v. Smith*, *supra* at 2789, and was therefore a public figure plaintiff. The *McDonald* Court thus had no need to expressly hold that the result under the Petition Clause would have been the same had the case been brought by a private figure.

[12] Signally, even Bagley is at loggerheads with the *en banc* Court on this crucial point. In his petition for certiorari, Bagley states, "In *McDonald v. Smith*, the Supreme Court held that a defendant in a libel action is entitled to a qualified privilege if the defamatory publication is involved in the right to petition the government under the First Amendment to the Constitution." Petition for certiorari at 5 (citation omitted).

Trial, 9 The Guide to American Law 222, 225 (West 1984); 8 English Historical Documents 1660-1714 (A. Browning ed. 1953); M. Ashley, The Glorious Revolution of 1688 (1966); D. Lovejoy, The Glorious Revolution in America, 220-38 (1972). Other English attacks upon petitioning by claiming the petitioners were guilty of libel are reported in *Lake v. King*, 1 Saund. 131 (1680), and *Fairman v. Ives*, 5 Barn. & Ald. 642 (1822).

The technique of discouraging petitioning by libel was also attempted in this country early in our history. In 1798 and 1799, Congress received several petitions seeking repeal of the notorious Alien and Sedition Acts, and arguing that the acts were unconstitutional. 5 Annals of Congress 2798-99 and 2757-59 (1799). The proponents of the acts (the Federalists) urged such petitions should be suppressed and that the petitions should not be considered by Congress because they constituted a libel. The response to this effort was the urging by the Republicans that libel did not defeat this constitutional right. Rep. Edward Livingston (R.-N.Y.) asked,

> To what would the gentlemen reduce the right of petitioning? Have not the people a right . . . to say to Congress, "You have done wrong, you have exceeded your powers." If they think so, who shall stop their mouths, since the Constitution has guaranteed them this right?

Id. at 2799-800. *See also, id.* at 1711 (1798) (Rep. Macon), 1719 (Rep. Brent), 2801 (Rep. Gallatin), and 2957-58 (Rep. Gallatin) (all arguing that if libel defeats the right to petition, the First Amendment Petition Clause is reduced to a nullity).

Congress rejected the Federalists' attempt to suppress by libel the right to petition, and the "libelous" petitions were referred to the Committee of the Whole for consideration. *Id.* at 2802-03 and 2959.

Half a century later, another attempt to inhibit petitioning by claiming libel occurred and again was unsuccessful. In *White v. Nicholls*, 3 How. (44 U.S.) 266 (1845), this Court, in dealing with a common law libel action based on statements made in petitions to the President and Secretary of the Treasury, reviewed the common law libel privileges and held

that petitioning *qua* petitioning was privileged.[13] *White* was the principal authority cited with approval and relied upon by this Court in *McDonald v. Smith*.

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[13] At the time *White* was decided, the common law of libel presumed that all defamatory speech was uttered with "malice" in the common law sense of spite or ill will, 3 How. (44 U.S.) at 286 and 291; moreover, the presumption of "malice" included the presumption that the offending words were false. *Id.* at 284. Privileged speech was speech which, *judged by the occasion*, represented situations in which it was inappropriate to presume that the speaker spoke falsely and maliciously—*i.e.*, with "malice." Among the privileged situations was petitioning. *Id.* at 286-92.

The *White* Court held that the petitioning privilege at common law was a protection from liability in the absence of specific proof by the plaintiff of what *White* called "actual malice," *id.* at 289, or "express malice." *Id.* at 291. The proof necessary to overcome the privilege—*i.e.*, proof that would be deemed sufficient to establish common law malice—was proof of (1) falsity, and (2) the absence of probable cause—in other words, falsity and fault. *Id.* at 291. Today, of course, those elements are required to be proved as a prerequisite to liability for all non-privileged speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 1563-64 (1986). Speech that is in fact "privileged" is now afforded the higher protection of requiring the plaintiff to prove knowing falsehood or reckless disregard. *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617, 624 (1984); *Schulze v. Coykendall*, 218 Kan. 653, 545 P.2d 392, 399 (1976); *Gaynes v. Allen*, 128 Mich. App. 42, 339 N.W.2d 678, 679-82 (1983); and *Bender v. City of Seattle*, 99 Wash. 2d 582, 664 P.2d 492, 504-05 (1983) (all holding that in the post-*Gertz* period common law libel privileges are also defeasible only upon proof of knowing falsehood or reckless disregard).

In *New York Times*, this Court adopted one of the terms that had been used by the *White* Court to describe the petitioning privilege at common law—"actual malice"—to describe the "knowing falsehood or reckless disregard" standard that would have to be met to overcome the privilege for speech about public officials. Thus, between the time of *White* and that of *New York Times* the law had so changed that what was in the beginning a privilege is now the rule for all speech; privileged communications are now accorded the knowing falsehood or reckless disregard level of protection, but still under the rubric of "actual malice".

In this century, the constitutional privilege of petitioning *qua* petitioning, *i.e.*, as a separate and distinct privilege, has been recognized by this Court and other courts as providing constitutional protection from (a) the antitrust laws, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-40 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972), (b) the labor laws, *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 740-43 (1983), (c) the civil rights laws, *Gorman Towers, Inc. v. Bogoslawsky*, 626 F.2d 607, 614-15 (8th Cir. 1980), and (d) various state statutory and common law causes of action other than libel. *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1316-19 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). All of these cases were decided solely on whether there was in fact an exercise of the petitioning right, and none on the special status of any person or group that was the subject of the petition.

We submit that in light of the constant use of libel to suppress petitioning, it would be a constitutional aberration if the libel suit is favored vis-a-vis petitioning while causes of action such as antitrust, the labor laws or civil rights are not so deferentially treated.[14] This Court has squarely held that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Limitations are imposed by the Speech and Press Clauses when the plaintiff has public status, *New York Times, supra; Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); limitations should be imposed by the Petition Clause whenever the defendant is engaged in *genuine*, *i.e.*, bona fide, petitioning of the Government.

Justice Brennan observed in *McDonald* that the Petition Clause may well at times overlap with the Speech and Press

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[14]The Eighth Circuit has acknowledged that the protection afforded by the Petition Clause should not vary depending upon the type of claim under consideration. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, No. 85-1805, slip op. (8th Cir. Aug. 26, 1986) (available on LEXIS, see p. 7 of LEXIS opinion).

Clauses, *McDonald, supra* at 2792-93, n.2 (Brennan, J., concurring), and the observation is manifestly correct. However, the dichotomy between the two distinct rights still exists constitutionally and historically; the two rights have never been melded into one prior to this case. The Speech and Press Clauses have as their root purpose the encouragement of robust debate in the marketplace of ideas and the fostering of dialogue among and between the general populace; the Petition Clause serves the separate purpose of encouraging candid and open communication about governance to those who govern by those who are governed. There is plainly an interrelationship and overlap between the two rights, but they are independent guarantees that serve separate societal values. *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The Eighth Circuit's opinion effectively drums the Petition Clause out of the Constitution when a petition is challenged for defamation. Indeed, the result of the Eighth Circuit's decision in this case is that a petitioner to the Government is afforded no more "breathing space," *New York Times, supra* at 271-72, than is afforded to run-of-the-mill speech involving totally private individuals. The Eighth Circuit has thus determined as a matter of constitutional policy that the citizen's right to communicate to the Government (here, the Congress) concerning his wants and needs (and here his fears) is deserving of the lowest level of values assigned to democratic communication. We believe, quite to the contrary, that the right to petition is crucial to representative government and organized liberty, and that the Eighth Circuit erred in ascribing to petitioning the lowest permissible protection constitutionally allowed.

The public/private figure distinction drawn in *Gertz v. Robert Welch, Inc., supra*, was predicated on a balancing of promoting free expression and protecting reputations. The balance was held to tip in favor of free expression, and to require additional "breathing space," whenever public persons were involved because of the importance of such speech to the core values protected by the Speech and Press Clauses—i.e., promoting robust debate on public questions.

See New York Times, supra at 270. Speech about public issues is at the "core" of the First Amendment because it is the stuff of self-government. As this Court held in *Garrison v. Louisiana*, 379 U.S. 64 (1964), "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (Quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

Petitioning the Government is as critical and central to republician self-government as is the right to freely speak about public affairs to the electorate. It may in some circumstances be even more so. Petitioning is the constitutionally declared way for the governed to communicate their desires and concerns to their elected representatives and, as such, is as inseparable from the concept of representative government as is the right to vote. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court held that,

> The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575.

If the "core" activities protected by *New York Times* require actual malice breathing space for effective exercise, so also must the equally ranked "core" activity of petitioning. And, *a fortiori*, since private individuals and institutions are often inextricably bound up in a matter involving the Government, especially in the affairs of this era, the right to petition, to be effective, *must* include within the "actual malice" penumbra the ability to discuss all the participants regardless of their status. The breathing room and vitality of a petition should not be contingent upon whether those

involved in influencing Government activity or decisions are public or private persons.[15]

Finally, if petitioning is a "core" activity, the present case is the "core" of the "core." IBP here was not seeking a benefit from Government or an affirmative policy change; rather, it was the Government that was initiating a change in the law to IBP's detriment, and IBP was defending itself, hoping to *prevent* the Government from moving against the company. IBP, under severe Congressional attack (P.A. A at 2-6), was as much involved as any grand jury target, and exercised its petitioning right to try to protect itself from an encroachment that was in reality an economic punishment. If the Constitution ever protects the right to petition, it must be in such a defensive context.

At common law, one of the categories of speech always privileged was that made in reply to charges leveled against the speaker. *See, e.g., Haas v. Evening Democrat Co.*, 252 Iowa 517, 107 N.W.2d 444, 453 (1961); *Gettis v. Kilgo*, 128 N.C. 402, 38 S.E. 931, 933-36 (1901); *Israel v. Portland News Publishing Co.*, 152 Or. 235, 53 P.2d 529 (1936). If the charges are made in a Government forum, a petition responding and urging Government non-action is not only a reply to such charges (and thus privileged at common law), but is "defensive" petitioning.[16] Such defensive petitioning is clearly also a significant constitutional

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[15] In the analogous setting of judicial proceedings, the common law recognizes that private individuals must at times be discussed in order to convey the evidence to the trier of fact, and thus holds privileged *all* statements made in judicial proceedings. *Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981); *Yaselli v. Goff*, 12 F.2d 396, 402-03 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); Restatement (Second) of Torts § 585, Comment e (1977).

[16] In this case, the *en banc* Court specifically recognized that IBP's petitioning was "defensive in nature." (P.A. A at 14.) Incongruously, the Court declined to override the trial court's ruling that IBP was not entitled to instructions regarding that common law privilege. (P.A. A at 10-12.) The result reached by the Eighth Circuit is all the more disturbing when one takes into account the fact that Bagley's libels of IBP that led to IBP's response are *absolutely* privileged because they were made in testimony before the Subcommittee. Restatement (Second) of Torts § 590A (1977); *see also* P.A. C at 17-18.

bulwark against unfair, unfounded or unwise action by the Government against members of the electorate.

Plainly, when one petitions the Government to defend himself against adverse action urged upon the Government by others, the protection of the actual malice standard is necessary to provide "breathing space," essential to the effective exercise of the right. In the judicial setting, that right would be accorded absolute protection; it is constitutional error to label such activity as simply ordinary speech, deserving of *no* special protection, when the setting is the Congress.

In sum, as Judge Arnold noted in his dissent from the denial of rehearing *en banc*, the Eighth Circuit has misread *McDonald v. Smith* and the historical precedents. The nature of the communication and not the public or private stripe of the plaintiff must determine the existence of the privilege or the Petition Clause has been stripped of its central meaning. We re-echo the hope of Judge Arnold and his three colleagues that the Court will hear this case and resolve the scope of the Petition Clause in libel suits; the issue will arise again and the law is totally unsettled.

II.
THE EIGHTH CIRCUIT'S TEST FOR LIMITED PURPOSE PUBLIC FIGURE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

There was clearly a public controversy over whether IBP was stifling competition in the meat industry. Congress was scrutinizing IBP, some antitrust litigation had begun, more was being planned, and the media was focusing on the dispute. (P.A. A at 2-4 and 21; P.A. C at 6-7; Tr. 510-511.) Bagley voluntarily thrust himself into this controversy, as he put it, to "stand up and be counted" in order to prevent IBP from "swallow[ing] up all of its smaller competition," and "to prevent a massive takeover by IBP of the packing industry." (P.A. C at 9 and 28.)

Bagley delivered IBP documents and information about IBP to antitrust lawyers and Congressional staff (in the latter

case, voluntarily moving to partially vacate a protective order to permit him to do so (P.A. A at 4).[17] He wrote and delivered before the Subcommittee a public statement accusing IBP of "attempt[ing] to control and monopolize the packing industry," (P.A. C at 9), and appeared on a television program about the issue. (Tr. 510-511; IBPX 105a).[18] Nevertheless, the Eighth Circuit declared Bagley was a purely private person and not even a limited public figure. The Eighth Circuit committed constitutional error first by applying an impermissible test to define "the controversy," and then by its definition of the character and kind of acts sufficient to create limited public figure status.

The Eighth Circuit failed to recognize that the Subcommittee inquiry, the antitrust activity and the press attention were all manifestations of a single public controversy over the meat industry in general, and IBP's alleged role in stifling competition in particular. Instead of defining "the controversy" in terms of the *issues* that were the subject of debate in various fora, the Eighth Circuit equated "the controversy" with a particular *forum* at a particular time and place, even though that discrete event was only a setting for

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[17] Bagley, on his own volition, moved to partially lift a judicial protective order to enable him to provide the IBP documents to the Subcommittee. (P.A. A at 4.) Nevertheless, the *en banc* Court characterized all of Bagley's dealings with the Subcommittee, including his eight days of private meetings with staff members, as having been undertaken "under subpoena," and thus not properly to be taken into account in determining public figure status. (P.A. A at 4 and 22-23.) The Rules of the House, however, make clear that witnesses may be subpoenaed only to testify before committees and subcommittees. Rules of the House of Representatives, Rule XI, *see esp.* Cl. 2(m); *see also* Cl. 1(b); 2(g); 2(h); and 2(k). Private meetings with staff members to prepare for hearings and petitioning a court for documents are clearly purely voluntary matters, and bear heavily upon Bagley's limited public figure status.

[18] Although the television show was aired after IBP sent its letter to the Subcommittee, there is no suggestion in the record that the IBP letter prompted Bagley's appearance on the show or created a controversy that had not previously existed. Bagley's television appearance thus bears heavily on his continuing voluntary attempts to influence the resolution of the controversy.

one part of a broader, ongoing debate. The Court held that, "[T]he particular controversy 'giving rise' to IBP's defamatory letter was the Subcommittee's increasingly antagonistic inquiry into numerous IBP business practices." (P.A. A at 21.) Having chosen to call one facet of the debate "the controversy," the Court, not surprisingly, found that Bagley's issue-influencing activities that fell outside of that particular segment were not a part of his attempts to involve himself and influence the outcome of what the Court had distilled out as "the controversy." (P.A. A at 24-25.)

The Eighth Circuit's defining of "the controversy" in the very narrow context of one public proceeding, when the controversy here is widespread both area-wise and time-wise, conflicts with the decisions of this Court and of other Circuit Courts of Appeals. In *Gertz v. Robert Welch, Inc. supra*, this Court recognized that it is the controverted issues, and not a particular forum of discussion of those issues, that defines the scope of "the controversy." The Court recognized there that a coroner's inquest, a criminal prosecution and a civil lawsuit arising out of a fatal shooting by a police officer were all aspects of one public controversy over the shooting. *Id.* at 352.

Decisions of other Circuit Courts of Appeals have faithfully followed the *Gertz* approach. In *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986), the particular statement alleged to be defamatory concerned the plaintiff's participation as an expert witness in a civil lawsuit challenging the safety of the drug Bendectin. The District of Columbia Circuit recognized that the particular lawsuit was merely one facet of the debate over the safety of the drug. Accordingly, the *McBride* court defined "the controversy" in terms of the drug safety issues, rather than in terms of a particular forum in which the issues were then being debated. *Id.* at 1211.

The Eighth Circuit here, having defined "the controversy" as the Congressional hearing, gave no consideration to Bagley's efforts to assist the plaintiffs and potential plaintiffs in the antitrust litigation. In *McBride*, by contrast, the D.C. Circuit found of significant consequence the plaintiff's testi-

mony about the drug before the Food and Drug Administration in determining public figure status even though the alleged libel related to his participation as an expert witness in a lawsuit. The *McBride* court ruled that the plaintiff's voluntary assistance to one side in the lawsuit and his testimony before the Government exemplified "a paradigm of the limited purpose public figure concept." *Id.* at 1211. The holding below and *McBride* cannot be squared.

The Sixth Circuit has also defined "the controversy" in terms of the controverted issues. *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981), involved an NBC historical drama about the trial of one of the "Scottsboro boys" in Alabama in the 1930's. Although the specific alleged libels all concerned NBC's portrayal of the events of the "crime" and the trial of one of the defendants, "the controversy" was not defined narrowly in terms of the particular trial. Rather the Sixth Circuit held that the plaintiff's status was to be determined in light of the "public controversy concerning the fairness of our criminal justice system . . . ." *Id.* at 1235.

The holdings of the Sixth and D.C. Circuits are clearly correct, and the Eighth Circuit is both in conflict with these circuits and in error. The greater the intensity of the controversy and the greater its import to the public, the greater will be the number of fora spanned by the ensuing debate. Thus, the Eighth Circuit would label as private persons the very individuals who are involved in controversies where the debate is the most intense and far reaching. We do not believe that a libel plaintiff can avoid public figure status by being deeply involved in a controversy but for whatever reason avoiding involvement at the precise focal point that prompted the libel suit. Rather, it is the totality of the nature and extent of the participation in the debate over the controverted public issues that determines the plaintiff's status, *Gertz v. Robert Welch, Inc.*, *supra* at 352; and here Bagley's involvement in the public issue regarding IBP was pervasive.

Finally, the Eighth Circuit erred in holding that unless Bagley was eagerly seeking media attention for himself, he was not a limited public figure. (P.A. A at 22-23.) The

limited public figure doctrine exists because broad and free discussion about private citizens who seek to influence the course of public issues is thought to be crucial to an adequate understanding and fair resolution of those issues. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147-48 (1967) (plurality opinion). Thus in determining whether a plaintiff is a limited purpose public figure, this Court has looked "to the nature and extent of [his or her] participation in the particular controversy giving rise to the defamation," *Gertz v. Robert Welch, Inc.*, *supra* at 352, and not to whether or not the plaintiff is a self-seeker of publicity.

Bagley's public figure status is thus not dependent upon whether he sought to influence the resolution of the issues by being "out front," or did so by quietly and surreptitiously collaborating with Congressional staffers and antitrust lawyers. One becomes a public figure whether he attempts to manipulate public issues by orchestrating events from behind the scenes, or by appearing in a spotlight at center stage. In either instance, such a person has elected to become embroiled in a public controversy and the fact of participation, as well as motives, biases, credibility and credentials, bear heavily upon an assessment of the public dialogue that is generated. The correct focus is thus not on the amount of media attention the plaintiff's activities have received. Rather, it is on whether the plaintiff's activities have in fact, as here, been directed to influencing the outcome of a controversy in which the public has a significant stake. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). *See also Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) ("[A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.").

In sum, the Eighth Circuit's truncated conception of "the controversy" and its focus on the media attention given to Bagley personally conflict with the decisions of this Court, of other Circuit Courts of Appeals, and with constitutional logic.

III.

THE EIGHTH CIRCUIT COMMITTED *BOSE* ERROR

In *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court held that when First Amendment principles are at stake, the appellate courts and, ultimately, this Court, will determine, after an independent review of the record, whether constitutional mandates have been obeyed. The *Bose* Court stated:

> [I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression."

466 U.S. at 499.

The Eighth Circuit's only reference to the *Bose* independent review requirement was its holding that it was not required to conduct such a review for evidence of actual malice because Bagley is a private person. (P.A. A opinion at 27.) The Court failed to recognize that the First Amendment mandates independent review not only of the actual malice determination, but of all First Amendment issues. *Bose Corporation v. Consumers Union of United States, Inc., supra* at 505-511; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (applying independent review standard to determination of whether alleged libel was germane to plaintiff's participation in the controversy); *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 897 (D.C. Cir. 1984) (independent appellate review applied to prior restraint and overbreadth questions); *Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir. 1985) (independent review requirement applied to claim that employee was discharged for criticizing superiors); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir.), *cert. denied*, 106 S.Ct. 182 (1985) (holding independent review of entire record required generally "[i]n First Amendment cases"); *Bender v. Williamsport Area School District*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), *vacated on other grounds*, 106 S.Ct. 1326 (1986) (*Bose*

mandates independent review of whether Establishment Clause prohibited on-campus meetings of high school students' religious organizations).

Thus even assuming, *arguendo*, that the Court below was correct that the only constitutional protection for IBP was the Speech Clause, the Court was obligated to independently review the record to determine Bagley's public or private figure status. *Bose Corporation v. Consumers Union of United States, Inc., supra.* There is not the slightest suggestion in any of the opinions that the Eighth Circuit did so. An independent search of the record would have disclosed overwhelmingly that Bagley had voluntarily thrust himself to the forefront of a controversy concerning the meat industry and IBP, and was a public person.

The Eighth Circuit may have concluded that *Bose* was inapplicable to a claimed exercise of the petition right because the Court placed it on a lower level of value than rights under the Speech and Press Clauses. However, the *Bose* opinion clearly requires an independent searching of the record whenever the First Amendment is involved. *Bose Corporation, supra* at 505-511. The policy reasons that prompted *Bose*—*i.e.*, to have an appellate court safety valve that the First Amendment is always strictly obeyed—are equally present where it is petitioning that is involved as when speech is involved.[19]

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[19] Moreover, because the actual malice standard is applicable to this case both under *McDonald* and because of Bagley's public figure status, the Eighth Circuit also erred in failing to conduct an independent review of the record to determine whether there was clear and convincing evidence of actual malice. *Bose Corporation, supra.* Bagley is not entitled to a retrial if, as is clearly the case, there is insufficient evidence of actual malice to support a jury verdict against IBP. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2514 (1986) (holding that even at the summary judgment stage the court is to relieve a libel defendant of the burden of proceeding to trial if the record discloses that the plaintiff cannot meet the constitutional standard). The record in this case is completely devoid of actual malice evidence and, in fact, Bagley's brief in the Eighth Circuit did not even purport to cite any evidence of actual malice. (Brief for Appellee.)

The Eighth Circuit's failure to conduct an independent review of the record supports in and of itself the issuance of the writ to review this case.

IV.

FIRST AMENDMENT RIGHTS ARE A SHAM IF HIGHLY INFLAMMATORY AND IRRELEVANT EVIDENCE IS ADMITTED

At trial, Bagley was permitted to introduce evidence of numerous alleged reprehensible acts of wrongdoing by IBP; those claimed acts were inflammatory and entirely unrelated to the issues. Bagley's charges ranged from price-fixing and predatory pricing to unfair labor practices and connections with the Mafia. (See Statement of the Case, *supra* at 10.)

The trial court did instruct that punitive damages for libel were precluded unless the jury found that the defendant had acted with actual malice.[20] (P.A. A at 26.) Not surprisingly, the jury nevertheless returned a punitive award of $5 million on the libel claim, and a total punitive award of $7.25 million.

The protections that this Court has declared to be required by the First Amendment are sterile and meaningless if jurors are grossly inflamed by allowing them to believe that Attila the Hun or Al Capone is before them. The only Court of Appeals that has expressly considered the issue, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1489 (1986), held that:

> Although the district judge enjoys a broad discretion in balancing prejudice and probative value under Rule 403, we think he exceeded the limits of that discretion in

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[20] That instruction, however, did not contain a correct allocation of the burden of proving falsity; the trial court's assignment to IBP of the burden of proving truth served as the basis for the unanimous reversal of the plaintiff's libel judgment by the Eighth Circuit. (P.A. A at 25-27.) The instruction also failed to properly limit the jury's consideration of whether there was actual malice to the two statements alleged to be libelous, or even to those statements in the letter that were of and concerning Bagley. (Jury instruction 27.)

> this instance, and note that he himself remarked after the slide show that he had made a mistake in allowing it. In another setting such a mistake might not warrant a new trial. But the Supreme Court has told us (most recently in the *Bose* case, see 104 S.Ct. at 1962) to be assiduous in protecting the press, even in its least worthy manifestations, from the fury of outraged juries.

Id. at 1142.

This Court has held in cases involving other important constitutional rights that a proper jury instruction at the end of a trial does not cure egregious trial errors that, in effect, render jury instructions virtually worthless. *See Bruton v. United States*, 391 U.S. 123 (1968) (holding that a criminal defendant's Sixth Amendment rights are not adequately protected by a jury instruction that his co-defendant's confession cannot be considered by the jury in determining the non-confessing defendant's guilt). The principle certainly applies where First Amendment rights are at stake. Trials must be conducted with appropriate respect for First Amendment and fairness requirements throughout—not just when instructing the jury.

We respectfully suggest this case raises for the first time the question of the interplay between the First Amendment and the trial judge's evidentiary discretion.

V.

BAGLEY'S TORTIOUS INTERFERENCE JUDGMENTS WERE THE RESULT OF A FUNDAMENTALLY UNFAIR TRIAL

A litigant is denied due process of law when the procedures employed by a trial court fail to provide him a fundamentally fair hearing. *Walker v. Engle*, 703 F.2d 959, 968-69 (6th Cir.), *cert. denied*, 464 U.S. 962 and 951 (Rehnquist, J., dissenting) (1983); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 419 U.S. 1042 (1980). The Due Process Clause does not guarantee litigants a perfect trial, but it does guarantee basic procedural fairness.

All semblance of fairness to IBP was destroyed by the district court's rulings on evidence, argument and jury instructions. The court admitted evidence of every immaterial alleged past sin of IBP that Bagley's counsel could dredge up. (See Statement of the Case, *supra* at 10.) Then the court permitted Bagley's lawyer to argue to the jury that even more was known about how despicable IBP was than the jury had been told. (Tr. 2209.) Finally, the court refused to give IBP's proffered instruction, or indeed *any* instruction, on justification in connection with Bagley's claims for tortious interference—in effect ruling, contrary to settled common law, that IBP could not escape liability no matter how justified its conduct may have been. (Tr. 2204.)

This repeated and egregious unconcern for the laws of evidence and final argument denied IBP a fair hearing and resulted, *inter alia*, in a $650,000 judgment for tortious interference with present employment which was permitted to stand by the Eighth Circuit.[21] (P.A. A at 28.) We recognize the wide latitude of the trial judge on matters of evidence and argument, and the heavy burden we have to show that due process has been offended as a result of rulings on those matters. But we believe that here the district court's rulings on evidence, argument and jury instructions exceed all the bounds and, at the very least, consititute so great a departure from proper judicial procedure as to call for an exercise of this Court's power of supervision. It was as if the district court had held that there would be no rules of evidence, no limitation on argument, and that IBP was not entitled to any justification.

In *Walker v. Engle*, *supra*, the Sixth Circuit, faced with precisely this kind of evidence and argument, held:

> It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness. The trial was inflamed by marginally relevant

[21] In addition, the separate judgment for tortious interference with prospective employment was remanded with instructions that it be reinstated to the extent that it did not duplicate recovery on the libel claim. (P.A. A opinion at 29-30.)

> and irrelevant evidence that was highly prejudicial. . . . [T]he trial court denied [the defendant] due process of law in violation of the Constitution.

Id. at 968-69.[22]

This Court has similarly reversed judgments where the jury's exposure to prejudicial information has denied the defendant the procedural fairness our system demands. *See Marshall v. United States*, 360 U.S. 310 (1959) (holding based on the Court's exercise of its supervisory power over the federal courts).

CONCLUSION

For the foregoing reasons, Petitioner IBP, inc. prays that this Court issue a writ of certiorari to review the Eighth Circuit's judgment in this case.

Respectfully submitted,

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[22] *Walker* was a criminal case; the Due Process Clause requires fundamental fairness in civil, as well as criminal, trials. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

86-956

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IBP, INC.,

Petitioner,

v.

HUGHES A. BAGLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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REQUIRED LISTING OF RELATED COMPANIES

Petitioner IBP, inc. is a wholly-owned subsidiary of Occidental Petroleum Corporation.

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APPENDIX A

United States Court of Appeals

For the Eighth Circuit

No. 83-1894

In Re:

IBP Confidential Business Documents Litigation

Hughes A. Bagley,

Appellee,

v.

Iowa Beef Processors, Inc.,

Appellant.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: April 30, 1985

Filed: July 24, 1986

Before LAY, Chief Judge, and HEANEY, BRIGHT,* ROSS, McMILLIAN, ARNOLD, John R. GIBSON, FAGG, and BOWMAN, Circuit Judges, *En Banc.*

FAGG, Circuit Judge.

Iowa Beef Processors, Inc. (IBP) appeals from the judgment of the district court awarding Hughes A. Bagley, a former IBP employee, $7 million in compensatory and punitive damages as well as $2.33 million in prejudgment interest. That judgment was entered on three distinct claims:

* The HONORABLE MYRON H. BRIGHT assumed senior judge status on June 1, 1985.

(1) libel; (2) tortious interference with present employment; and (3) tortious interference with future employment opportunities.

IBP's challenge to the district court's judgment has previously been considered by a panel of this court. *Bagley v. Iowa Beef Processors, Inc.*, 755 F.2d 1300 (8th Cir. 1985). Given the important issues raised by this case, however, IBP's appeal has now been considered by the court *en banc*. After carefully considering each of the issues raised by IBP, we affirm in part, reverse in part, and remand Bagley's libel claim to the district court for a new trial.

I. Background

Late in 1977, the Subcommittee on General Small Business Problems of the House of Representatives Committee for Small Business (the Subcommittee) initiated an investigation into various aspects of the meat industry. The Subcommittee's goal in undertaking the investigation was essentially two-fold. First, the Subcommittee hoped to identify business practices employed in the meat industry that affect adversely the competitive position of small meatpackers. Second, and more important, the Subcommittee hoped to determine whether existing laws were sufficient to ensure the continued presence of healthy competition in the meat industry.

During its investigation, the Subcommittee closely examined the activities of various meatpackers. Over the course of its investigation, however, the Subcommittee's interest came to focus most sharply on the activities of one particular meatpacker. That meatpacker was IBP.

The Subcommittee's interest in IBP was hardly surprising. Over the course of a relatively few years, IBP had grown into the largest processor of beef in the United States, and by the very nature of its size, IBP was viewed by many to be in a position to influence significantly the overall structure and development of the meat industry. Further, and equally as significant to the Subcommittee were various

IBP business activities that in the past had attracted substantial public attention. These activities, while often innovative, had at times also been highly controversial. In fact, IBP on a number of occasions had found itself the target of antitrust litigation, adverse publicity, and violent union confrontation.

In the course of its activities, the Subcommittee conducted a number of public hearings. During these hearings, a variety of witnesses appeared and testified concerning IBP and its impact on the meat industry. Several of these witnesses specifically accused IBP of engaging in anticompetitive practices.

As part of its overall investigation, the Subcommittee, in November of 1978, subpoenaed a large number of documents then under protective order in the United States District Court for the Southern District of Iowa. At that time, the ownership of these documents was at the center of a lawsuit filed by IBP against Hughes A. Bagley, a former IBP executive vice president. *See IBP, Inc. v. Bagley*, 754 F.2d 787 (8th Cir. 1985).

Bagley, an individual with thirty years experience in the meat industry, had been an executive with IBP from December of 1971 until July of 1975. In July of 1975, Bagley was abruptly fired by IBP and was ordered to leave immediately. Bagley left immediately, but in so doing took with him from his personal files the documents that three years later became the focus of IBP's lawsuit against him. These documents, numbering many thousands of pages, included IBP weekly profit and loss statements, IBP monthly production and sales reports, confidential legal memoranda, and memoranda outlining IBP's goals, marketing strategies, and pricing formulas.

The events leading to IBP's lawsuit against Bagley took place in late 1977 and early 1978. During that period, Bagley met privately with and in several cases provided IBP documents to a number of individuals, including several

attorneys who at that time were involved in (or hoped to become involved in) extensive antitrust litigation against IBP and several other meatpackers. Shortly after these meetings and during the course of the antitrust litigation, IBP learned of Bagley's activities and of his possession of internal IBP documents. *See Meat Price Investigators Association v. Iowa Beef Processors, Inc.*, 448 F. Supp. 1, 2-4 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163, 164-165 (8th Cir. 1978).

At that point, IBP instituted its action against Bagley. In that action, IBP sought to recover possession of the documents. IBP also accused Bagley of violating a termination agreement that had been entered into by Bagley with IBP following Bagley's departure from IBP.

As part of IBP's lawsuit, the district court placed a protective order on the IBP documents in Bagley's possession. That order was in place when the Subcommittee's subpoena duces tecum was issued to Bagley. On Bagley's motion, the district court partially lifted the protective order to enable Bagley to comply with the Subcommittee subpoena. *See Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979).

After examining the subpoenaed documents, the Subcommittee, in January of 1979, subpoenaed Bagley personally. Under subpoena, Bagley met with Subcommittee investigators in January and answered questions concerning the subpoenaed documents. Bagley was also subpoenaed to testify before the Subcommittee, and in July of 1979, Bagley again met with Subcommittee investigators to answer additional questions concerning the IBP documents.

Prior to the hearings at which Bagley was scheduled to testify, Subcommittee Chairman Neal Smith of Iowa sent a letter on behalf of the Subcommittee to IBP President Robert Peterson. In that letter, Congressman Smith invited IBP to send a representative to Washington to testify before the Subcommittee during its July hearings.

Congressman Smith stated that any representative sent by IBP would appear "under oath" and would have an opportunity to present a "written statement" as well as make an "oral presentation of reasonable length." Following that presentation, IBP's representative would be "questioned" by the members of the Subcommittee. *See Small Business Problems in the Marketing of Meat and Other Commodities: Hearings Before the Subcommittee on SBA and SBIC Authority and Small Business Problems of the House Committee on Small Business*, 96th Cong., 1st Sess. 3 (1979).

In his letter, Congressman Smith also specifically identified those topics of central interest to the Subcommittee. The topics mentioned by Congressman Smith included

> matters raised by the so-called "Bagley documents," the reported expansion efforts of IBP into the western portion of the United States, matters involving the labor and transportation practices and relationships of IBP, activities of IBP in the areas of meat pricing and cattle futures, the procurement practices of IBP in obtaining live cattle for slaughter and other possible topics.

Id. In essence, these topics touched upon the various concerns regarding IBP's activities that had been raised during the course of the Subcommittee's investigation.

In closing the letter, Congressman Smith emphasized the seriousness of the Subcommittee's investigation, stating:

> As you know, a great deal of testimony received by the Subcommittee has been in regard to Iowa Beef Processors. If new legislation or rules are enacted to limit dominance by any companies in the meat industry or to ensure that enough competition remains in the industry to prevent undersirable economic consequences, it is clear that Iowa Beef Processors will be one of the companies most affected.

Id.

The Subcommittee reconvened on July 23, 1979. During two days of hearings, Bagley was the only witness to appear and testify. In his two days of testimony, Bagley (under questioning) addressed a number of topics related to various IBP business practices. These topics included IBP's company goals, IBP's pricing practices, and IBP's dealings with other meat packers.

One topic discussed by Bagley during his testimony is particularly relevant to the present dispute. That topic concerned an IBP quantity discount program offered on its Cattle-Pak boxed beef product. In general terms, boxed beef is a method of processing and marketing beef in which IBP, rather than the retailer, fully processes the beef carcass into primal and subprimal cuts. These cuts are then individually packed in vacuum-sealed plastic bags and shipped individually or in units (as is the case with Cattle-Pak) to retailers. Not only is this an efficient method of processing beef, but because much of the bone and fat that would otherwise be shipped to retailers is removed by IBP during processing, shipping costs are substantially reduced.

Bagley testified that in its inception, the Cattle-Pak discount program, which, according to Bagley, was offered only to IBP's biggest customers, was intended to reflect and pass on a portion of the cost savings realized by IBP from high volume sales. Bagley stated, however, that the corporation failed to justify or document the supposed cost reductions prior to offering the program. Bagley testified further that IBP continued the discount program even after serious questions concerning its ability to justify the program based on cost reductions had been raised. According to Bagley, while questions about the program culminated in mid-1973 with a recommendation that the program be discontinued, some type of discount program was still in effect at IBP in June of 1975.

While invited to do so, IBP declined to send a representative to the Subcommittee's July 1979 hearings. Rather, on August 1, 1979, IBP, through its president, Robert Peterson,

responded to Congressman Smith's invitation by letter (the Peterson letter). In that letter, IBP explained its reasons for not attending the hearing, essentially taking the position that Congressman Smith was prejudiced against it and would prevent IBP from receiving a fair hearing before the Subcommittee. *See* Letter from IBP to Congressman Smith 1-5 (August 1, 1979). IBP also offered a detailed response challenging the testimony of each of the witnesses who had appeared before the Subcommittee and testified about IBP and its business practices.

Approximately one-half of the Peterson letter addressed statements made by Bagley during his two days of testimony. IBP answered fully each of the issues covered by Bagley, characterized by IBP as a disgruntled ex-employee who, upon leaving IBP, "stole 7 boxes of IBP documents, many of a confidential business and legal nature." *Id.* at 15.

Of particular significance here is IBP's explanation of the quantity discount program testified extensively to by Bagley. In its response to Bagley's description of that program, IBP sharply attacked Bagley's testimony, asserting that "Bagley's version of IBP's quantity discount program is absolutely false, and • • • constitutes perjury • • •." *Id.* at 24.

Explaining its version of the program, IBP conceded that for a short period of time a quantity discount had been offered to all IBP customers purchasing a certain quantity of Cattle-Pak cattle. IBP asserted, however, that on advice of counsel the discount program was discontined in late 1973 pending a long-range study intended to identify and quantify those savings believed by IBP to be inherent in volume purchases. According to IBP, Bagley was intimately involved in the termination of the discount program and knew the program had been discontinued in 1973. *See id.* at 24-27.

With respect to Bagley's contention that the quantity discount program was still in effect in 1975, IBP did acknowledge that for a short period in 1975 a price reduction of eight dollars per head had been offered to all IBP Cattle-Pak customers.

IBP contended, however, that this rebate constituted a special one-time price reduction in no way related to IBP's long discontinued quantity discount program. Acccording to IPB, Bagley's suggestion to the contrary was "clear perjury." *Id.* at 27.

IBP sent a a copy of the Peterson letter to each member of the Subcommittee and expressly requested that the Subcommittee make the letter a part of its formal public record. The Subcommittee refused IBP's request and did not make the Peterson letter a part of the Subcommittee's public record. However, by mid-September portions of the letter had been leaked to the press and had been widely reported in the media.

Despite the Subcommittee's refusal to make the Peterson letter a part of its formal record and despite repeated requests, IBP for a time refused to make copies of the Peterson letter available to interested parties. Rather, IBP referred all inquiries to the Subcommittee. In October, however, after the letter had already received extensive media coverage, IBP made the letter available to those in the media and in the meat industry who expressed an interest in it. Further, late in 1979, as part of a bound volume containing several other documents, IBP sent the Peterson letter to a number of interested parties, including members of the Livestock and Grain Subcommittee, IBP's directors, officers, and plant managers, certain members of various agricultural associations, professors at several academic institutions, and approximately fifty members of the media.

Not surprisingly, given the highly antagonistic relationship already existing between Bagley and IBP, Bagley, in the wake of the Peterson letter as well as other events occurring after his congressional testimony, filed the present lawsuit against IBP. As originally filed, Bagley asserted five separate and distinct claims against IBP. Due to attrition, however, only three of these claims are still a part of Bagley's lawsuit.

The first claim asserted by Bagley in the district court was a claim of libel arising out of statements made by IBP in the Peterson letter. As submitted to the jury, Bagley specifically challenged only two statements made by IBP in the Peterson letter: First, IBP's statement that "[Bagley] stole 7 boxes of IBP documents"; and second, IBP's statement that "Bagley's version of IBP's quantity discount program is absolutely false, and * * * constitutes perjury * * *." Trial Court Instruction No. 9.

The second claim asserted by Bagley was a claim of tortious interference with present employment. In that claim, Bagley contended that following his congressional testimony he was abruptly dismissed from Dubuque Packing Company (Dubuque), his then current employer. According to Bagley, that dismissal, coming only six days after his testimony, was effectively caused by veiled yet intimidating threats made by IBP to Dubuque.

The final claim asserted by Bagley was a claim of tortious interference with future employment opportunities. In that claim, Bagley argued that IBP caused not only his termination by Dubuque but also effectively "blacklisted" him from the entire meat industry. While prior to his testimony and firing Bagley received repeated offers of employment, after these events offers of employment completely stopped and Bagley was unable to locate work in the meat industry.

Following a jury trial, Bagley prevailed on all three of these claims and was awarded a total of $9.33 million in damages and interest. IBP's appeal from these awards is now before the court.

II. Discussion

A. *Libel*

Before the district court, IBP asserted several defenses to Bagley's claim of libel. These defenses included claims of both common law and constitutional privilege. In essence, IBP asserted that the Peterson letter should be protected

under either a common law testimonial or right to reply privilege or under a constitutional privilege based upon the first amendment right to petition. The district court rejected each of the privileges asserted by IBP.

The district court likewise rejected IBP's contention that Bagley should be held to be a public figure for purposes of this action and should be required to prove "actual malice" as defined by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). By contrast, the district court ruled that Bagley was a purely private figure for purposes of this lawsuit.

Finally, the district court ruled, again over objection, that in light of the harsh and unprivileged nature of IBP's statements, Bagley would not be required to prove the falsity of IBP's libelous statements. Rather, the district court held that IBP would be required to prove the truth of its statement that Bagley "stole" IBP documents as well as its statement that Bagley committed "perjury" before the Subcommittee.

On appeal from a jury verdict awarding Bagley $1,000,000 in compensatory damages and $5,000,000 in punitive damages, IBP challenges each of these rulings by the district court. IBP also challenges a number of the district court's evidentiary rulings that it asserts were highly prejudicial, denied IBP a fair trial, and induced the jury to award constitutionally excessive punitive damages. With IBP's various contentions in mind, we turn to Bagley's libel judgment.

1. *Common Law Privilege*

Before the district court, IBP repeatedly asserted that under common law the Peterson letter was a privileged communication and could not be used by Bagley as a basis for recovery. In support of its position, IBP asserted two separate and distinct claims of common law privilege: (1) an absolute common law privilege applicable to statements made during the course of legislative proceedings; and (2) a

qualified common law privilege protecting a party's ability to reply in an appropriate manner to public accusations.

While neither party has addressed the issue, we note initially that the question of qualified or absolute common law privilege, while not without federal implications in light of the involvement of a federal congressional subcommitee, is a question of state rather than federal common law. *See Webster v. Sun Co.*, 790 F.2d 157, 160 (D.C. Cir. 1986); *Yip v. Pagano*, 606 F. Supp. 1566, 1569-70 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 106 S. Ct. 2248 (1986); *Bio/Basics International Corp. v. Ortho Pharmaceutical Corp.*, 545 F. Supp. 1106, 1110-13 (S.D.N.Y. 1982). Thus, to determine whether a common law privilege exists, we must look to Iowa substantive law, which IBP and Bagley both concede is generally applicable to this action.

As this court has previously indicated, in the area of libel, Iowa common law recognizes both absolute and qualified privileges. *See Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 n.4 (8th Cir. 1979); *Johnston v. Cartwright*, 355 F.2d 32, 35 (8th Cir. 1966). Specifically, a review of the relevant Iowa case law indicates that under certain circumstances Iowa courts will recognize an absolute testimonial privilege, *see, e.g., Mills v. Denny*, 63 N.W.2d 222, 225 (Iowa 1954), or a qualified right to reply privilege, *see, e.g., Haas v. Evening Democrat Co.*, 107 N.W.2d 444, 451-53 (Iowa 1961). However, whether and to what extent a privilege will be applicable in a given case depends on the unique circumstances of that case and will be determined as a matter of law by the trial court. *Mills*, 63 N.W.2d at 227; *see also Johnston*, 355 F.2d at 35.

Here, the district court, after examining the available case law and after considering the occasion and circumstances giving rise to IBP's various distributions of the Peterson letter, rejected both claims of common law privilege. In so doing, the district court first concluded that IBP's widespread distribution of the Peterson letter to many individuals and entities totally unrelated to the Subcommittee's investigation could not reasonably be viewed as legislative

testimony, and thus the letter fell beyond the narrowly defined scope of the testimony privilege. The court also concluded that, although a right to reply privilege is available in certain cases, IBP's various distributions of the Peterson letter, under the circumstances of this case, went beyond an appropriate response to the Subcommittee's investigation and as a consequence were unprotected under Iowa law by a right to reply privilege.

In making these determinations, the district court was without benefit of any Iowa court decision clearly suggesting how the Iowa courts would themselves have resolved the particular questions of privilege presented in this case. In the absence of controlling state law, this court will ordinarily give significant deference to a district court's resolution of unclear questions of state law. *St. Paul Fire & Marine Insurance Co. v. Rock-Tenn Co.*, 787 F.2d 340, 341 (8th Cir. 1986); *Northern States Power Co. v. ITT Meyer Industries*, 777 F.2d 405, 413 (8th Cir. 1985).

Here, our own independent review of Iowa case law convinces us that the district court's rulings on the questions of privilege must be affirmed. While not unchallengeable, the district court's decisions are neither without support nor unreasonable. Thus, we decline to second-guess the district court's rejection of IBP's claims of absolute and qualified state common law privilege.

2. *First Amendment Petitioning*

IBP contends, however, that regardless of the availability of a common law privilege, its activities with respect to the Peterson letter are classic examples of petitioning activity entitled to some degree of first amendment protection. The district court rejected IBP's contention, in effect concluding that IBP's activities were entirely devoid of first amendment substance or value. In reaching that conclusion, we believe the district court clearly erred.

We note initially that the Supreme Court has recently reaffirmed the principle that petitioning, like "other

guarantees of [the first amendment,] * * * is an assurance of a particular freedom of expression." *McDonald v. Smith*, 105 S. Ct. 2787, 2789 (1985). This reaffirmation clearly underscores the coequal status of the right to petition with other first amendment rights.

In reviewing IBP's claim that its actions were genuinely intended to influence the legislative process and thus constitute protected first amendment petitioning, this court is guided by *Eastern Railroad Presidents Conference v. Noerr Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). While these cases involved antitrust rather than defamation claims, the principles underlying the Supreme Court's analysis in each of these cases are equally applicable to the present action and provide this court with a framework upon which to consider Bagley's challenge to the legitimacy of IBP's asserted petitioning.

Thus, before activities claimed to constitute first amendment petitioning will be stripped of all first amendment protection, the party challenging such an assertion must prove as a matter of fact, *see Independent Taxicab Drivers Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 612 n.9 (5th Cir.), *cert. denied*, 106 S. Ct. 231 (1985), that the challenged activites were not genuinely intended to influence the legislative process. In so doing, the challenging party must establish in part that the petitioning party has abused or corrupted the legislative process. *See, e.g., California Motor Transport Co.*, 404 U.S. at 511-16; *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 486-88 (8th Cir. 1985). Here, the record is devoid of any evidence to suggest IBP's actions in any way abused or corrupted the legislative process surrounding the Subcommittee's investigation.

For almost two years, the Subcommittee's investigation had centered on potentially anticompetitive business practices in the meat industry, of which IBP is a prominent and often controversial member. During that period, numerous

charges had been directed against IBP, and by July of 1979, the central focus of the Subcommittee's investigation clearly was on IBP. In fact, Congressman Smith in his letter to IBP explicitly stated that any legislation adopted as a result of the Subcommittee's investigation would leave IBP as one of the companies "most affected." In this largely adversarial context, IBP answered the charges directed against it by writing to Congressman Smith and the other members of the Subcommittee.

We believe it is of no significance that IBP chose to respond to the Subcommittee's investigation by letter rather than appear before the Subcommittee. The right to petition is personal in nature, and IBP, rather than the Subcommittee or its chairman, has the right to determine how and in what manner that right will be exercised. If IBP's presence was absolutely necessary to the Subcommittee's investigation, the Subcommittee could have subpoenaed IBP as it had Bagley.

The Peterson letter itself provides evidence that IBP's actions constituted petitioning activity, genuinely intended to influence the legislative process. Significantly, in its letter, IBP did not raise issue not then before the Subcommittee, but rather limited its response to those topics already raised by the Subcommittee. That response was essentially two-fold. First, IBP responded directly to the various charges brought against it in an attempt to give its side of every issue. Second, IBP sought, when possible, to undermine the testimony of the various witnesses (including Bagley) by bringing to light their potential motives and biases. This overall response, precipitated not by IBP but rather by a significant congressional inquiry, was largely defensive in nature and supports IBP's claim that its actions constituted first amendment petitioning.

IBP's later redistribution of the IBP letter in no way undermines our conclusion. By its very nature, the right to petition the government goes beyond direct petitioning activity. Rather, the right to petition the government necessarily

includes all manner and mode of communication directed not only to the government but also to those individuals and entities whose support and influence may contribute materially to the legislative campaign being waged. *See, e.g., Noerr Motors Freight, Inc.*, 365 U.S. at 142-43.

Here, IBP's redistribution simply sought to inform and enlist the support of those elements of society believed by IBP to be interested in, potentially affected by, or in a position to influence the Subcommittee's investigation. Without these attendant rights, IBP's first amendment right to petition would be rendered virtually meaningless in this case, particularly since the governmental body to which IBP's letter was directed chose not to make it a part of the body's formal public record.

By response, neither Bagley nor the district court identified any evidence to support a conclusion that IBP's actions did not constitute a genuine attempt to protect its interest by influencing the legislative process. No evidence was presented to suggest that IBP's actions were intended to or in fact perverted or in any way corrupted the legislative process. *See California Motor Transport Co.*, 404 U.S. at 511-16; *see also Razorback Ready Mix Concrete Co.*, 761 F.2d at 486-88.

At bottom, regardless of IBP's ill will towards Bagley, *see Noerr Motor Freight, Inc.*, 365 U.S. at 132-45, IBP's activities on their face clearly evidenced genuine petitioning activity. The district court's conclusion to the contrary was based on an erroneous interpretation of the applicable law, was unsupported by the eivdence, and must be reversed. Thus, we hold that IBP's activities constituted genuine first amendment petitioning.

However, having concluded the district court erred in failing to recognize the nature of IBP's actions, we are not yet required to reverse Bagley's libel judgment. Rather, we must next identify the degree of protection to be accorded IBP's activities under the first amendment. After identifying the appropriate degree of protection, reversal will be

required only if the district court's instructions failed to provide IBP with the appropriate level of first amendment protection.

3. *Degree of First Amendment Petitioning*

Before the district court and on appeal, IBP asserted that because first amendment petitioning was involved, its activities were entitled to an absolute constitutional privilege insulating it from all defamation liability. The Supreme Court, in *McDonald v. Smith*, 105 S. Ct. 2787 (1985), has now rejected that position. *Id.* at 2791. Rather, in *McDonald*, the Court emphasized that "there is no sound basis for granting greater consitutional protection to [petitioning] * * * than [to] other First Amendment expressions." *Id.* at 2791 (citation omitted); *see also id.* at 2794 (Brennan, J., concurring).

Flowing from the Supreme Court's discussion in *McDonald*, we hold that in the area of defamation, first amendment petitioning is protected by the same constitutional principles identified by the Supreme Court as applicable in other cases involving defamatory first amendment speech. More specifically, we conclude the principles embodied in such cases as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), are fully applicable to the present controversy.

The fact that cases such as *New York Times* and *Gertz* involved media defendants, while arguably relevant in identifying the particular first amendment freedom involved, is in our view irrelevant to the question of what level of constitutional protection that right is to receive. To recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that "[t]he inherent worth of * * * speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *see*

also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2953 and n.4 (1985) (White, J., concurring in result).

Since its decision in *New York Times*, the Supreme Court has sought an appropriate balance between two important yet often conflicting interests: (1) the interest in assuring vigorous and robust debate on public issues; and (2) the interest in protecting the reputation of each individual from unjustified defamatory attacks. As the principles intended to protect these interests have been shaped and defined, the Supreme Court has made clear that to identify the appropriate level of protection applicable in a particular case, a court must focus its inquiry on the question of whether the person defamed is a public official, a public figure, or a private figure.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court held that public officials and public figures may not recover in defamation unless they "prove[] that the [challenged] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80; *see Curtis Publishing Co.*, 388 U.S. at 162 (Warren, C.J., concurring); *see also Gertz*, 418 U.S. at 335-36 and n.7. The actual malice standard must be established by clear and convincing evidence, *id.* at 342, and is subject to independent rather than deferential appellate review, *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 513-14 (1984).

While *New York Times* and *Curtis Publishing Co.* defined the constitutional limits applicable to the public official's or the public figure's right to recover for defamatory speech, it was not until *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974), that the Supreme Court delineated the constitutional limitations applicable when the defamation action is brought by a purely private figure. In examining the question, the Supreme Court identified two central factors that distinguish private individuals from public officials or public figures.

First, the Supreme Court noted that public officials and public figures "usually enjoy significantly greater access to the channels of effective communication" than private individuals. *Id.* at 344. Thus, public officials and public figures are in a better position than private individuals to attempt to rebut and reduce the harm of a defamatory statement. *Id.*; *but see id.* at n.9. Because private individuals have fewer avenues of this type of self-help open to them, their overall potential for injury as a result of defamatory speech is significantly increased and as a result so is the state's interest in protecting that individual from injury. *Id.* at 344.

Second, and more important, the Supreme Court emphasized that public officials and public figures, unlike private individuals, have purposefully sought to become involved in the affairs of society either by "seek[ing] [a] governmental office" or by otherwise assuming a role of particular "prominence in the affairs of society." *Id.* at 344-45. Thus, to that extent these individuals invite and indeed must expect public comment, praise, and criticism alike concerning their fitness to command the public's attention and support. By contrast, a private individual has sought neither office nor influence and as result has assumed no prominent role in society's affairs and has given up no interest in the protection of his or her reputation. In tandem, these two factors suggest private individuals "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.* at 345.

In light of these considerations, the Supreme Court in *Gertz* concluded that states should be given significant leeway in providing a legal remedy to the defamed private individual. With this in mind, the Court left states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. *Id.* at 347. The Supreme Court did provide, however, that although a simple showing of fault would allow a private individual to establish liability and recover actual damages, actual malice, as defined in *New York*

Times, must still be established before presumed or punitive damages can be recovered. *Id.* at 348-50.

Since *Gertz*, the Supreme Court has in one instance apparently narrowed and in another instance further defined the applicability and requirements of *Gertz*. First, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), the Court determined that the *Gertz* limitation on the recovery of presumed and punitive damages should be applicable only when the defamatory statement involves a matter of "public concern." *Id.* at 2944-48. Matters of public concern go to the very core of the first amendment and encompass speech that is intended to effect political or social change or that is otherwise related to enlightened self-government. *Id.* at 2445-46. Absent speech of this nature, the balance of comparative interests shifts in favor of the state and allows a private individual to recover presumed and punitive damages without a showing of *New York Times* actual malice. *Id.* at 2946.

The second decision impacting the Supreme Court's decision in *Gertz* is *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). In *Hepps*, as an initial point, the Court made clear that as a part of their defamation suit public officials and public figures must prove the falsity of the statements challenged. *Id.* at 1563; *see also id.* at 1570 n.10 (Stevens, J., dissenting). More important for our purposes, the Supreme Court then went on to hold that in order to recover in defamation private individuals must not only demonstrate fault but must also prove that the defamatory statements were in fact false. *Id.* at 1563-64.

4. *Bagley's Status*

With the applicable constitutional standards now identified, this court must next determine Bagley's status for purposes of this lawsuit. If Bagley is a public official or a public figure, the *New York Times* actual malice standard will be applicable to Bagley's libel claim. If, on the other hand, Bagley is found to be a private figure, the less formidable

Gertz standard, as modified in *Dun & Bradstreet* and *Hepps*, will be applicable to that claim. The question of Bagley's status presents an issue of law to be determined by the court. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 740 (D.C. Cir 1985), *cert. denied*, 106 S. Ct. 2247 (1986); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1081 n.4 (3d Cir.) *cert. denied*, 106 S. Ct. 182 (1985); *cf. Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).

As an initial matter, the parties are in agreement on two points. First, the parties agree that Bagley is not a public official. Second, the parties also agree that Bagley has not received such "pervasive fame or notoriety" that he can be viewed as "a public figure for all purposes and in all contexts." *Gertz*, 418 U.S. at 351. Further, we note that IBP does not contend that Bagley is one of those "exceedingly rare" individuals who with respect to the issues presented by this case can be considered an "involuntary" public figure. *Id.* at 345. Thus, our inquiry is narrowly limited to determining whether Bagley must be considered a limited public figure with respect to the narrow range of issues presented by his libel claim.

To resolve that question, our inquiry must begin with *Gertz*. Under *Gertz*, this court, in determining whether an individual should be considered a limited public figure, must focus its attention on the "nature and extent of an individual's participation in the particular [public] controversy giving rise to the defamation." *Id.* at 352. By so doing, the court will be able to determine whether the individual has voluntarily and purposefully injected himself into that controversy in an attempt to influence the resolution of the issues there involved. *Id.* at 345, 351.

Applying the factors identified in *Gertz*, this court must identify the "particular [public] controversy giving rise" to IBP's defamatory speech. *See Id.*; *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *see also Wolston v. Readers Digest Association*,

443 U.S. 157, 166 n.8 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

Although the Supreme Court has never explicitly identified those factors necessary to create a *Gertz* public controversy, the Court has made clear that simple newsworthiness alone will be insufficient to generate such a controversy. *Wolston*, 443 U.S. at 167. Further, purely private disputes (such as a lawsuit) whose impact is limited primarily to the parties involved, while often of interest to the public, will also be insufficient to create a *Gertz* public controversy. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). Rather, the Court, in identifying a *Gertz* public controversy, has focused its attention on those controversies involving questions of "public concern," *see Dunn & Bradstreet*, 105 S. Ct. at 2944-47, or, in other words, those controversies raising issues that might reasonably be expected to have an impact beyond the parties directly enmeshed in the particular controversy, *Waldbaum*, 627 F.2d at 1296-97.

Here, the particular controversy "giving rise" to IBP's defamatory letter was the Subcommittee's increasingly antagonistic inquiry into numerous IBP business practices. That investigation, which included a number of public hearings, generated substantial public comment and was widely reported in the media. Bagley's testimony alone generated well over a dozen news articles.

Further, the controversy generated by the Subcommittee's investigation, by its very nature, went beyond a purely private dispute that only by mere chance attracted the interest of the public. Rather, because the investigation had the potential to generate new legislation that might reasonably have been expected to affect both the meat industry and the consumer, the resulting controversy was in fact a "public" controversy, involving issues of significant public concern.

The Peterson letter itself was written in response to the Subcommittee's investigation and further demonstrates the well-defined public nature of the particular controversy here

at issue. In that letter, IBP specifically and in detail responded to each of the charges leveled against it throughout the Subcommittee's investigation. Further, IBP explicitly recognized the relatively widespread interest in the Subcommittee's proceedings when in its letter IBP appealed directly to the "open-minded members of * * * [the] Subcommittee, the media, the cattle and beef industry, and the public" for support. Letter from IBP to Congressman Smith 4-5 (August 1, 1979). The record is clear and the Peterson letter establishes that the Subcommittee's investigation into IBP was the particular public controversy that "gave rise" to the defamation here at issue. *See Gertz*, 418 U.S. at 352.

Having identified the particular controversy giving rise to the defamation, the court must next examine the "nature and extent" of Bagley's involvement in that controversy. *Id.* As previously stated, this inquiry is necessary to determine whether Bagley has "thrust [himself] to the forefront of [that] * * * controversy in order to influence the resolution of the issues [there] involved." *Id.* at 345; *see Waldbaum*, 627 F.2d at 1297-98.

Here, Bagley's involvement in the Subcommittee's investigation was a limited one. Bagley appeared under subpoena, as a witness, and cooperated with the Subcommittee as he had an obligation to do. That participation was limited to answering whatever questions the Subcommittee had about IBP or the IBP documents. Further, both before and after his congressional testimony, Bagley conscientiously avoided the media, making no public comment. In fact, outside the limited role of a subpoenaed witness, Bagley played no part in the policymaking or deliberative processes of the Subcommittee. And, the media attention that followed IBP's distribution of the Peterson letter provides no support for IBP's position because IBP cannot by its own conduct make Bagley a public figure. *Hutchinson*, 443 U.S. at 135.

In light of Bagley's limited involvement in the Subcommittee's investigation, this court cannot conclude that Bagley has purposely thrust himself into the legislative

process in order to influence the resolution of the issues there involved. To do so would effectively deprive almost every witness appearing before a congressional subcommittee of his or her status as a private citizen. Such a result would be unnecessarily harsh and would largely ignore the valuable role private individuals play in the legislative process. Further, private individuals with relevant information would become hesitant to cooperate with a congressional inquiry and would thus deprive Congress of a valuable source of information.

IBP contends that the focus of this court's inquiry with respect to the nature and extent of Bagley's activities is far too narrow. In support of that position, IBP focuses its attention on the events leading to its lawsuit against Bagley in which IBP sought the return of the IBP documents. Specifically, IBP points to the number of instances in which Bagley met with and provided IBP documents to various individuals who for one reason or another were interested in IBP's business practices. IBP contends that these activities were freely and voluntarily undertaken by Bagley and are sufficient to strip Bagley of his status as a private figure. We disagree.

Assuming Bagley's various activities are at all relevant to the question of whether he is a public or private figure, we still conclude they cannot deprive Bagley of the mantle of private person status. First, despite meeting with various individuals, Bagley never sought or received any public attention as a result of these meetings. Rather, his meetings with these individuals were entirely private and nonpublicized. In fact, it appears that Bagley was not even the individual who initiated these meetings. Further, it is not determinative that Bagley should have known his actions might lead to a lawsuit or might constitute a breach of his contractual agreement with IBP. *Cf. Wolston*, 443 U.S. at 167-68.

Second, regardless of his purpose in meeting with and providing documents to these individuals, the outcome of

these activities was a purely private lawsuit. The issues involved in that controversy, even if newsworthy, were purely private in nature and were unlikely, upon resolution, to have any significant impact beyond the parties immediately involved. Further, in relation to this lawsuit Bagley sought no public audience and did not attempt to use the court's forum to influence the resolution of any issue being considered by the Subcommittee. *See Time, Inc.*, 424 U.S. at 454 n.3. This purely private dispute is neither a "public" controversy nor does Bagley's involvement in it label him a public figure. *Id.* at 454.

We also reject IBP's contention for a more fundamental reason. Namely, the activities relied on by IBP were distinct from and unrelated to Bagley's involvement in the particular public controversy "giving rise" to the Peterson letter. Very simply, Bagley's meetings with various individuals as well as his involvement in IBP's lawsuit seeking to recover the IBP documents impacted no issue before the Subcommittee and involved a purely private controversy of no interest to the Subcommittee. Congressman Smith, in opening the July hearings, expressly stated that the Subcommittee was "not interested directly or indirectly or even remotely in [Bagley's legal] skirmishes [with IBP]." *Small Business Problems in Marketing of Meat and other Commodities*, 96th Cong., 1st Sess. at 5. In large part, Bagley is much like the plaintiff in *Gertz* who, despite being active in community and professional service, publishing several books and articles, and representing a client on a civil matter related to the controversy at issue in that case, was insufficiently involved in the particular public controversy "giving rise" to the defamation that he could not be classed as a public figure with respect to that "particular controversy." *Gertz*, 418 U.S. at 351-52.

We conclude that although Bagley's various meetings may have "given rise" to IBP's lawsuit against Bagley, those meetings were no part of Bagley's participation in the Subcommittee's investigation, which for purposes of this case is the "particular [public] controversy giving rise to [IBP's

defamatory letter]." *Id.* at 352. Rather, these meetings were part of a purely private dispute between IBP and Bagley. Thus, given Bagley's limited role in the Subcommittee's investigation of IBP, we conclude that for purposes of this lawsuit Bagley must be considered a private figure.

5. *Bagley's Libel Judgment*

Having concluded that Bagley is a private figure and further because the speech here at issue involves matters of public concern, *see Dun & Bradstreet, Inc.*, 105 S. Ct. at 2947, we are now in a position to identify the elements of recovery constitutionally necessary to support Bagley's libel judgment. First, in light of *Hepps*, Bagley must prove IBP's statements that Bagley "stole" documents and committed "perjury" were in fact false. *Hepps*, 106 S. Ct. at 1563-64. Second, Bagley must establish that IBP was at "fault" in publishing these statements. *Gertz*, 418 U.S. at 347. Finally, to recover presumed or punitive damages, Bagley, in addition to proving falsity, *Hepps*, 106 S. Ct. at 1563, must prove by clear and convincing evidence that IBP's actions in publishing the challenged statements constituted "actual malice" as defined in *New York Times*. With the components necessary to support Bagley's judgment now identified, we conclude that Bagley's libel judgment must be reversed.

At trial, the district court determined the statements in IBP's letter that Bagley "stole" documents and committed "perjury" in his congressional testimony were libelous per se and thus under Iowa law were presumed false. On that basis, and over objection, the district court instructed the jury that to avoid liability IBP, by a preponderance of the evidence, must prove that the statements challenged were in fact true.

As we previously noted, the Supreme Court has now made clear that in *Gertz*-type cases the plaintiff must bear the burden of proving that the challenged statements were false. *Hepps*, 106 S. Ct. at 1563-64. Thus, because Bagley was not required to prove the falsity of IBP's statements as required

by *Hepps*, Bagley's libel judgment must be reversed unless this court can determine that this failure constituted harmless error.

Bagley argues that any error is harmless in light of proper punitive damage instructions and a separate, identifiable award of punitive damages. While a separate award of punitive damages supported by proper instructions and a proper showing of proof may in certain cases render an erroneous compensatory damage instruction harmless, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 166 (1967) (Warren, C.J., concurring), we conclude that such is not the case in the present action.

Consistent with *Gertz*, the district court instructed the jury that Bagley could recover punitive damages only if he demonstrated by "clear and convincing" evidence that IBP's actions were motivated by actual malice. Trial Court Instruction No. 27; *see Gertz*, 418 U.S. at 348-50. Further, the district court properly defined actual malice as "[a] publication * * * made with * * * knowledge that it is false, or with reckless disregard of whether it was false or not." Trial Court Instruction No. 28; *see New York Times Co.*, 376 U.S. at 279-80.

These instructions, however, while requiring Bagley to prove actual malice, do not specifically require Bagley to prove that the challenged statements were false. And, in *Hepps*, the Supreme Court made clear not only that proof of falsity was an additional component that must be borne by all first amendment defamation plaintifffs, but that fault and falsity are two separate and distinct elements of recovery. *Hepps*, 106 S. Ct. at 1561-65.

Here, the only express instruction of the district court dealing with the burden of proving truth or falsity placed the burden squarely on IBP. Trial Court Instruction No. 9. The district court's instructions on punitive damages, while distinct from the liability instructions, are entirely silent on the issue of truth or falsity. Trial Court Instructions Nos. 27-

29. Thus, this court is unable reasonably to determine whether the jury's award of punitive damages flowed from the preliminary conclusion that Bagley proved the falsity of the challenged statements or that IBP had simply failed to prove their truth. And, as *Hepps* makes clear, a proper allocation of the burden of proving falsity is a constitutional requirement. *Hepps*, 106 S. Ct. at 1563-65.

Because we cannot reasonably conclude the punitive damage award reflected a finding of falsity on the part of the jury and as a result was untainted by the burden of proof instruction contained elsewhere in the district court's instructions, it is impossible to determine whether the award was made on a permissible or impermissible basis. Thus, the punitive damage award cannot serve to render the prior error harmless, and Bagley's libel judgment must be reversed and that claim remanded for a new trial. *See New York Times Co.*, 376 U.S. at 284; *see also Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 11 (1970).

Given the need for a new trial based upon Bagley's status as a private person and because any judgment for actual damages recovered by Bagley will not depend on an actual malice determination, we need not independently review the record for evidence of actual malice. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 511 (1985). At that trial, Bagley will undoubtedly present any and all evidence of fault, including evidence of actual malice, then available to him. Once this evidence has been presented, the district court, bearing in mind the exacting standard applicable to questions of actual malice, will be in a position to determine whether Bagley's claim for punitive damages can properly be considered by the jury.

We also have no need to address IBP's various evidentiary challenges. We do note, however, that the rulings challenged by IBP, even if erroneous, were not so prejudicial as to deny IBP a fair trial and require the reversal of Bagley's other judgments. On retrial of Bagley's libel claim, IBP is free to challenge again the court's rulings, and, in light of

the relatively narrow issues to be tried, the district court should consider not only whether this evidence is relevant to the issues being tried but also whether the probative value of these various pieces of evidence is sufficient to outweigh their potentially prejudicial effect.

B. *Tortious Interference*

We now turn to IBP's challenge to Bagley's claim of tortious interference with present employment. The jury awarded Bagley $150,000 in compensatory damages and $500,000 in punitive damages on that claim. With one modification relating to the district court's award of prejudgment interest, we affirm.

At the time of his testimony before the Subcommittee, Bagley was employed by Dubuque Packing Company (Dubuque), a competitor as well as a rival of IBP. Six days after his testimony, Bagley was abruptly and without warning fired by Dubuque. At trial, Bagley presented several pieces of evidence from which a jury could have concluded that certain actions on the part of IBP were the cause of his firing. Although IBP presented evidence that Bagley's firing was unrelated to any action on the part of IBP, the jury obviously rejected IBP's evidence and accepted Bagley's.

Because Bagley's position is not without substantial support, we are in no position to second-guess the jury that heard and was in a position to weigh the competing evidence. IBP, in its brief, essentially concedes the competing evidence created a question of fact to be resolved by the jury. Appellant's Brief at 66. Thus, we conclude the judgment in favor of tortious interference with existing employment must stand.

We turn next to IBP's challenge to the district court's judgment in favor of Bagley on his claim of tortious interference with future employment opportunities. The jury awarded Bagley $100,000 in compensatory damages and $250,000 in punitive damages on that claim. We affirm the

determination of liability on this claim, but remand the claim to the district court with instructions.

As an initial point, IBP argues that Bagley's claim of tortious interference with future employment opportunities is duplicative of his libel claim and thus provides no independent basis of recovery. Because we conclude that facts separate and apart from Bagley's libel claim support his tortious interference with future employment claim, we reject IBP's position.

From the evidene presented at trial, the jury could reasonably have found the following facts. Prior to his congressional testimony, Bagley was highly regarded in the meat industry, had a good reputation for honesty, ability, and integrity, and received numerous offers of employment. After that testimony, however, Bagley was fired from Dubuque at IBP's instigation. Further, Bagley was effectively "blacklisted" from the meat industry as a whole by IBP, and it was made clear to Bagley that he would never work in the meat industry again. The offers of employment stopped and, with one minor exception, Bagley has not again been able to obtain work in the meat industry.

These findings support the jury's determination of liability in favor of Bagley on this claim and would ordinarily justify an affirmance of the damages awarded. However, we agree with IBP that Bagley's recovery of damages on this claim has the potential to be duplicative of whatever damages Bagley may eventually recover on retrial of his libel claim. Consequently, we vacate that portion of the judgment awarding damages on the claim of tortious interference with future employment opportunities and remand that claim to the district court subject to the ultimate resolution of Bagley's libel claim.

If Bagley fails to recover on his libel claim, the award of damages should be reinstated. If Bagley recovers on his libel claim, however, the district court should then determine to what extent a recovery for tortious intereference with future

employment would duplicate his libel recovery. To the extent of any duplication, the award of damages on that tortious interference claim should not be reinstated.

Finally, with respect to each of Bagley's three claims, IBP challenges the district court's award of prejudgment interest to Bagley on the punitive damage awards recovered by him. Specifically, IBP argues that the district court erred in awarding prejudgment interest on those awards. After considering this issue of Iowa state law, *Sedco International v. Cory*, 683 F.2d 1201, 1212 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982), we agree.

Although unclear at the time of the district court's ruling, the Supreme Court of Iowa has now held that prejudgment interest may not be recovered on an award of punitive damages. *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984). Thus, we reverse the district court's award of prejudgment interest on Bagley's punitive damage awards.

III. Conclusion

We reverse Bagley's libel judgment and remand that claim for a new trial. With one exception, we affirm the district court judgment and award of damages on Bagley's claim of tortious interference with present employment. Finally, we affirm the district court judgment with respect to Bagley's claim of tortious interference with future employment opportunities to the extent of liability; however, because this recovery has the potential of being duplicative of any award that might be recovered by Bagley on his libel claim, we vacate that portion of the judgment and remand that claim to the district court with instructions.

BRIGHT, Senior Circuit Judge, and McMILLIAN and ARNOLD, Circuit Judges, concurring in part and dissenting in part.

We agree with the majority's conclusion that the district court erred in the libel action by placing on IBP the burden

of proving that Bagley "stole" the documents and committed "perjury." We further agree that this allocation of the burden of proof did not constitute harmless error. *See Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1158 (1986). We therefore concur in the majority's decision to reverse the libel judgment for Bagley, and remand the action to the district court (Majority Opinion at 37-29).

We also concur with the majority's holding rejecting IBP's claim to a common law privilege (Majority Opinion at 11-13) and with its conclusion that IBP's activities constituted genuine petitioning activity (Majority Opinion at 13-17). Finally, we agree that the judgment for Bagley on his action for tortious interference with present employment should be sustained, subject to striking the prejudgment interest on the punitive damages award. *See* Majority Opinion at 30-32.

In other respects outlined in this dissent, we disagree with the majority.

Our view on all issues before this *en banc* court have been fully addressed in the opinion authored by Judge Bright for the panel majority that initially heard and decided this case. *Bagley v. Iowa Beef Processors, Inc.*, 755 F.2d 1300 (8th Cir. 1985). We need not again repeat that opinion here. We expressly adopt the opinion of the panel,[1] and as stated in that opinion, we would hold that Bagley, for the libel action, occupies a status analogous to a limited public figure in a media case and therefore must bear the burden of proving IBP made the statements here in question with "actual malice." *Id.* at 1314-17; *see New York Times v. Sullivan*, 376 U.S. 254.

We would therefore remand this case to the district court for a determination, from the record, whether Bagley submitted sufficient evidence for a jury to find that IBP acted

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[1] We observe that the analysis of the panel on Bagley's libel claim has received support from subsequent decisions of the Supreme Court. *See Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558 (1986), *McDonald v. Smith*, 105 S.Ct. 2787 (1985).

with actual malice. 755 F.2d at 1317. If the district court concludes that Bagley produced sufficient evidence, there should be a new trial on the libel action with Bagley bearing the burden of proving actual malice to establish liability for the alleged defamation.

With respect to the propriety of the claim for tortious interference with future employment (Majority Opinion at 30-32), we disagree that the determination of liability should stand. In our view, that award will not stand as a claim separate from the cause of action for libel. As we stated previously, "[i]f on remand, Bagley establishes IBP's liability for libel, he should be allowed to recover for the adverse impact on his future employability." 755 F.2d at 1318.

Thus, in remanding for a new trial, we would direct the district court to proceed in a manner consistent with the opinion of the panel intially hearing this case and reported at 755 F.2d 1300 (8th Cir. 1985).

A true copy.

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CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

For the Eighth Circuit

No. 83-1894

In Re:

IBP Confidential Business Documents Litigation

Hughes A. Bagley, *Appellee,*

v.

Iowa Beef Processors, Inc., *Appellant.*

On Petition for Rehearing En Banc

Filed: September 11, 1986

Before LAY, Chief Judge, and HEANEY, BRIGHT,* ROSS, McMILLIAN, ARNOLD, John R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, *En Banc.*

ORDER

FAGG, Circuit Judge.

Iowa Beef Processors, Inc. (IBP) petitions this court for rehearing *en banc*. As a basis for its petition, IBP asserts this court "grievously misread" the Supreme Court's opinion in *McDonald v. Smith*, 105 S. Ct. 2787 (1985). Specifically, IBP

* The HONORABLE MYRON H. BRIGHT assumed senior judge status on June 1, 1985.

asserts that under *McDonald* the status of the plaintiff in a petitioning case is entirely irrelevant and rather that whenever the right to petition is exercised, that right is afforded the protection of the *New York Times* actual malice standard. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

We have considered IBP's contention and reject it. In so doing, we reaffirm the holding of our *en banc* opinion that "in the area of defamation, first amendment petitioning is protected by the same constitutional principles identified by the Supreme Court as applicable in other cases involving defamatory first amendment speech." *Bagley v. Iowa Beef Processors, Inc.*, No. 83-1894, slip op. at 17 (8th Cir. July 24, 1986). More precisely, we again conclude that the principles applicable to other types of first amendment speech, including the public figure/private figure distinction adopted by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-47 (1974), are fully applicable to defamatory first amendment petitioning activity.

This conclusion is in no way inconsistent with the Supreme Court's decision in *McDonald*. In *McDonald*, the plaintiff was an unsuccessful candidate for the position of United States Attorney and thus was clearly a public figure for first amendment purposes. It follows that under any circumstance the plaintiff in *McDonald* could have recovered only after establishing the defendant acted with *New York Times* actual malice. Consistent with this necessity, the Supreme Court was careful to find that the common law of North Carolina, under which the action was brought, is consistent with *New York Times*. *McDonald*, 105 S. Ct. at 2791.

Additionally, in response to defendant's contention that petitioning was entitled to a higher degree of first amendment protection than other types of first amendment speech, the *McDonald* Court stated that to accord petitioning greater protection than other first amendment freedoms (as is now suggested by IBP)

> would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

Id. at 2791 (citations omitted).

This theme of coequality was strongly echoed by Justice Brennan in his concurring opinion when, after discussing the common origin and overlapping nature of the various first amendment freedoms, *id.* at 2791-94 & nn. 2-3, he concluded that "[t]here is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States," *id.* at 2794.

Because first amendment petitioning receives neither more nor less protection than other first amendment freedoms, we conclude the same constitutional principles that have been developed by the Supreme Court with respect to other first amendment freedoms, including the public figure/private figure distinction, are applicable in this case.

IBP's petition for rehearing *en banc* is denied.

ARNOLD, Circuit Judge, with whom BRIGHT, Senior Circuit Judge, and McMILLIAN and MAGILL, Circuit Judges, join, dissenting from denial of rehearing en banc.

I respectfully dissent from the denial of the petition for rehearing.

Ordinarily, I would be content with the dissenting opinion previously filed by Judge Bright, in which Judge McMillian and I joined. The Court *en banc* has ruled, after full consideration, and there is not much point in pursuing the matter

further in this Court (though the Supreme Court may find the case interesting, and I hope it does). I write separately at this time simply to take note of the point made in the petition for rehearing: that *McDonald v. Smith*, 105 S. Ct. 2787 (1985), establishes that "*whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication and not the *status* of the defamation plaintiff is the touchstone." This summary of *McDonald*, which I have quoted from page 1 of the petition for rehearing, is, in my view, correct.

In other words, whether the plaintiff is a limited-purpose public figure or not, the statements by defendant on which he sues were contained in a petition to Congress for redress of grievances, and they should therefore be protected by the First Amendment to the extent indicated in *McDonald*. At the new trial, plaintiff should not be allowed to recover damages unless he proves actual malice.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals

For the Eighth Circuit

No. 83-1894

In Re:

IBP Confidential Business Documents Litigation

Hughes A. Bagley,

Appellee,

v.

Iowa Beef Processors, Inc.,

Appellant.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: February 14, 1984
Filed: February 13, 1985

Before BRIGHT, ARNOLD and FAGG, Circuit Judges.

BRIGHT, Circuit Judge.

Hughes A. Bagley brought this action[1] against Iowa Beef Processors, Inc. (IBP), claiming damages for libel, invasion of privacy, and tortious interference with employment,[2] all resulting from a letter written by IBP to a congressional subcommittee in which IBP in essence called Bagley a liar

[1] Before the Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa.

[2] In addition, Bagley claimed that a suit IBP filed against him in 1977 constituted an abuse of process. The district court ruled that the applicable statute of limitations barred this claim. This ruling is not in issue on appeal.

and a thief. Federal jurisdiction rests on diversity of citizenship. After twelve days of trial, the jury found IBP liable on all three claims and awarded Bagley compensatory and punitive damages of $8.75 million.[3] The district court entered final judgment, as modified after post-trial motions,[4] for $9.33 million. IBP appeals. We affirm the award for tortious interference with existing employment and reverse the awards for libel and tortious interference with future employment.

In submitting Bagley's claim of libel to the jury, the district court instructed the jurors that to recover damages Bagley must prove by a preponderance of the evidence:

> 1. That [IBP] published a letter concerning [Bagley] which was a libel as that term is defined in these instructions.
>
> 2. That [IBP] published the letter with knowledge that it was false.
>
> 3. That the libel was read by members of the general public.
>
> 4. That as a proximate result of [IBP's] actions, [Bagley] sustained damages.

The district court further instructed the jury that the allegedly defamatory statements in IBP's letter to the congressional subcommittee were libelous per se, creating "a

[3]The jury returned a verdict as follows:

Claim	Compensatory Damages	Punitive Damages
Libel	$1,000,000	$5,000,000
Invasion of Privacy	250,000	1,500,000
Tortious Interference with Employment	150,000	500,000
Tortious Interference with Prospective Advantage	100,000	250,000
	$1,500,000	$7,250,000

[4]The district court vacated Bagley's $1.75 million invasion of privacy verdict as a double recovery. Bagley does not appeal this ruling. In addition, the district court granted Bagley's motion for prejudgment interest, awarding him an additional $2.33 million. IBP contests this award of interest.

legal presumption of their falsity thus shifting to [IBP] the burden of proving the truth of the statements" and "a presumption of injury and damage even if actual pecuniary damages cannot be proved." As to damages, the district court explained that establishing the elements of his libel claim entitled Bagley to compensatory damages and that, if the jury found that IBP acted with "actual malice" (with knowledge that the statements were false or with reckless disregard of whether they were false or not), they could award Bagley punitive damages as well.

In its post-trial motion for judgment notwithstanding the verdict or alternatively for a new trial, IBP argued that the district court erred in so instructing the jury, and entered judgment on the libel claims in derogation of IBP's first amendment rights. IBP contended, among other things,[5] that the allegedly libelous letter and the subsequent republications thereof were privileged, urging the applicability of the following: 1) the absolute privilege at common law afforded statements made in the course of a legislative proceeding, 2) the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)), which protects bona fide attempts to petition the government, 3) the right, at common law, to reply in an appropriate manner to public accusations, and 4) the "actual malice" standard of liability, rather than presumptive liability, based on Bagley's alleged status as a limited public figure. IBP also contended that the district court unconstitutionally imposed liability without fault by instructing the jury to presume falsity. In addition, IBP argued that the

[5] IBP's post-trial motion and supporting memorandum listed in excess of fifty propositions without argument, each followed simply by case citations and citations to the record. The district court understandably declined to respond in detail to each point. Instead, it considered in depth only those objections which, in its view, "have merit or those where substantial controversy exists." In summarizing IBP's arguments before the district court, we limit ourselves to those objections specifically addressed by the district court that IBP raises once again on appeal.

damage awards, having no relationship to injury actually suffered, were constitutionally impermissible.

The district court rejected these arguments[6] and therefore denied IBP's motion for judgment notwithstanding the verdict or a new trial. IBP raises each of these arguments again on appeal. In addition, IBP contends that the district court denied it a fair trial by allowing the introduction of prejudicial and irrelevant evidence and by permitting improper closing argument. IBP also argues that the tortious interference verdicts must fall because they are hopelessly tainted by the libel portion of the trial.

We agree with IBP's contention that the libel instructions cannot pass constitutional muster. For the reasons discussed

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[6]The district court ruled that IBP's letter did not fall under the protective umbrella of the common law's legislative testimonial privilege because IBP's actions "took place away from the legislative proceeding in a non-testimonial context." The court declined to apply the *Noerr-Pennington* doctrine to Bagley's libel claim, concluding that such an application strayed too far from the context in which the doctrine originated (antitrust) and the contexts to which it is normally confined ("situations otherwise related to practices between competing business entities"). Assuming arguendo that the doctrine did apply, the court nevertheless found that IBP's actions fell within the "sham" exception because they "were not motivated by a genuine desire to influence legislation, but rather by a desire to cause [Bagley] harm." The court rejected IBP's common law right-to-reply defense because it found that IBP did not respond to Bagley's charges in an appropriate manner. Finally, the court declined to hold that Bagley was a limited public figure because he "did not voluntarily inject himself into the controversy," he did not have regular and continuing access to the media, and he was not the "primary actor" in the controversy.

The court also rejected IBP's argument that the presumptions embodied in the court's instructions to the jury were constitutionally impermissible. The court determined that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), did not change the law of libel in actions involving a private plaintiff and a non-media defendant. Thus, according to the court, the instructions appropriately embodied Iowa common law.

at length below, we believe that IBP is immune from liability unless Bagley can prove by clear and convincing evidence that the defamatory statements were false and that they were made with "actual malice."

I. BACKGROUND.

IBP, a large meatpacker, employed Bagley from mid-1971 to mid-1975, first as a consultant and then as vice president of retail sales development. In July of 1975, Bagley left IBP's employ,[7] taking with him files that he generated while he worked there (the Bagley Documents).[8] IBP and Bagley, both with the benefit of counsel, subsequently negotiated and executed a settlement agreement, releasing each other from potential liability arising out of their employment relationship and the termination thereof. In that agreement, Bagley agreed not to assist any third party in bringing a lawsuit against IBP.[9]

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[7] Bagley claimed, then and at trial, that he was fired. IBP took the position that Bagley chose to resign.

[8] The files included materials that he accumulated before, as well as during, his tenure at IBP. Among the documents in the files were IBP's weekly profit and loss statements, monthly reports on production and sales, the president's staff meeting reports, confidential legal memoranda, data concerning customers and their purchasing behavior, and memoranda outlining IBP's goals, marketing strategies, and pricing formulas.

In addition, Bagley later received some documents containing production figures from Charles Overstreet, a former IBP employee, and gained access to documents generated by IBP's formula pricing committee, which Hans Aarsen, another former IBP employee, took when he left IBP's employ (the Aarsen Documents). For purposes of this opinion, any reference to the Bagley Documents includes these documents.

[9] Clause 3.2 of the settlement agreement provides, in part:

Bagley, for himself and heirs, legal representatives and assigns, covenants with IBP to forever refrain from aiding, abetting or in any way assisting any third person not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstance, happening or thing whatsoever occurring or

(footnote continued on next page)

In late 1976 and early 1977, Bagley met with several lawyers who were interested in the potential antitrust ramifications of IBP's activities. Those lawyers were Albert Krieger, a criminal defense attorney, who, with one unrelated exception, had never handled an antitrust case but hoped to do so, based on information he learned from Bagley; Minnesota attorney John Cochrane and Iowa attorney Lex Hawkins, then representing the Meat Price Investigators Association (MPIA) in antitrust litigation against four meatpacking companies, including IBP; and attorneys who had on occasion represented the Greater New York Association of Meat and Poultry Dealers. In the course of these meetings, Bagley disclosed information about IBP's activities and permitted the attorneys to examine, and in some cases to copy, some of the Bagley Documents. Bagley also met in late 1976 with Irving Stern and Jess Proston, officials of the Meat Cutters Union, who, anticipating upcoming contract negotiations with IBP, discussed with Bagley the advisability of a strike.

IBP learned of Bagley's activities in the spring of 1977 and, on June 7, 1977, filed suit in federal district court against Bagley and others, seeking injunctive relief and damages. In its complaint, IBP alleged that Bagley breached his fiduciary duty to IBP and violated the express terms of his termination agreement.[10] IBP dismissed its claim against Bagley for damages in June of 1982, but continued to seek injunctive relief compelling Bagley to

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(footnote continued from preceding page)

failing to occur from the beginning of the world to the day of the date of these presents.

[10] In addition to Bagley, IBP named as defendants Stern and certain representatives of the Meat Cutters Union, lawyers Krieger, Hawkins, and Cochrane, and Hans Aarsen. IBP claimed, among other things, that Aarsen breached his fiduciary duty to IBP and that the others "intentionally, willfully and maliciously induced" Bagley to breach his termination agreement and "intentionally, willfully and maliciously caused and assisted" in Bagley's breach of his fiduciary duty to IBP. IBP dismissed all claims against these defendants in June of 1982.

return the Bagley Documents and to honor his contractual and fiduciary obligations.[11]

A. *The Subcommittee's Proceedings.*

In late 1977, the Subcommittee on Small Business Administration and Small Business Investment Company Authority and General Small Business Problems of the United States House of Representatives Committee on Small Business (the Subcommittee) began investigating the meatpacking industry. The Subcommittee held a number of hearings between October of 1977 and July of 1979 to examine particular problems faced by small packers and to determine whether existing legislation ensured continued competition in the industry. At least five witnesses who testified before the Subcommittee discussed or provided information about IBP, in some cases specifically charging IBP with anticompetitive conduct. The Subcommittee's investigator also gathered additional information about IBP in examining the Bagley Documents, which were subpoenaed in late 1978, and by questioning Bagley under subpoena in January and June of 1979 in preparation for hearings before the Subcommittee.

B. *The Subcommittee's Invitation to IBP.*

On June 29, 1979, Congressman Neal Smith from Iowa, chairman of the Subcommittee, invited IBP to send a spokesperson to testify before the Subcommittee during hearings scheduled for late July. In a letter to IBP's president, Robert Peterson, Congressman Smith wrote,

> I wish to take this opportunity to offer you or any other officer who has personal knowledge of the firm's activities and who can speak on behalf of Iowa Beef Processors the opportunity to voluntarily appear and testify before the Subcommittee. Such a hearing would be conducted pursuant to the Rules of the Committee on Small Business, a copy of which is included with this letter. Essentially, the witness or witnesses appearing

[11] The district court heard IBP's claim for injunctive relief at the same time that Bagley's claims were tried to a jury. The court ultimately rejected this claim. This ruling is the subject of another appeal, No. 83-2093, which we resolve in a separate opinion.

> on behalf of Iowa Beef Processors would have the opportunity to appear under oath and present a written statement of reasonable length which would be made a part of the Subcommittee's hearing record. Following the submission of this written statement and an oral presentation of reasonable length, the witness or witnesses appearing on behalf of Iowa Beef Processors would be questioned by members of the Subcommittee.

Congressman Smith went on to advise Peterson that "the questions can be expected to cover a broad range of topics and issues pertinent to the Subcommittee's inquiry[,] * * * undoubtedly includ[ing] matters raised by the so-called 'Bagley documents' * * *." In closing, Congressman Smith wrote:

> As you know, a great deal of testimony received by this Subcommittee has been in regard to Iowa Beef Processors. If new legislation or rules are enacted to limit dominance by any companies in the meat industry or to ensure that enough competition remains in the industry to prevent undesirable economic consequences, it is clear that Iowa Beef Processors will be one of the companies most affected.

IBP did not respond to Congressman Smith's invitation before the Subcommittee reconvened on July 23, 1979. At that time, in his opening statement, Congressman Smith explained:

> In the next several days we will closely examine certain areas of conduct in the industry in an attempt to learn how IBP, the largest meat packing company in the world, moved to its present position as the largest in the industry and with further expansion planned. Appearing under subpoena will be Hughes Bagley, a former vice president of IBP. We also will be introducing certain records and documents which we believe strongly corroborates [sic] the testimony which Mr. Bagley has given to the committee staff.

Congressman Smith went on to observe that,

> It is apparent that much of this testimony during the next two days will focus directly on IBP. We wish to be sure to give everyone an opportunity to speak to this committee in our search for the truth. Accordingly on June 29, 1979, I wrote a letter to the President of IBP, Mr. Robert Peterson, inviting IBP to appear before this committee and present testimony under oath, after which time IBP would be questioned by members of the committee. While I am not criticizing them for not having done so, IBP has not yet responded to my invitation. The invitation is still open and I am assuming that we will be hearing from IBP in the next two or three days.

C. *Bagley's Testimony.*

Only Bagley testified before the Subcommittee at the July 1979 hearings. In his opening statement, Bagley told the Subcommittee that while he worked at IBP, he "found reason to question" some of IBP's marketing practices. Bagley further explained that when he examined the Aarsen Documents in 1976, he "could see that somebody somehow had to stand up and be counted, or IBP was going to swallow up all of its smaller competition." He therefore agreed to meet with Krieger and the others; "I felt that [the lawyers] might be a starting point of my becoming involved in at least trying to prevent a massive takeover by IBP of the packing industry." In closing, Bagley stated:

> I feel sincerely that IBP has been responsible for some great innovations in the meat industry which have been for the common good of all segments of our business; however, I also believe that the company has in the past become overly zealous in its attempts to control and monopolize the packing industry.

In response to questions by Congressman Smith and others, Bagley identified three particular instances of potentially "overly zealous" behavior by IBP. First, Bagley explained that when he joined the Company in 1971, IBP understated its yield (the amount of salable meat it obtained

from a beef carcass) in its pricing formula, and by this understatement artificially inflated the price of its boxed beef. To remedy this overpricing without attracting attention from its customers, IBP began to increase gradually its stated yield. Despite this gradual rise, the yield, according to Bagley, still presented "a problem" for IBP when he left in 1975. Second, Bagley told the Subcommittee that until the fall of 1974, IBP offered its Cattle-Pak[12] at "special prices" to Waldbaum, a New York supermarket chain, and, in addition, did not hold Waldbaum accountable for periodic increases in service fees. Finally, Bagley claimed that IBP instituted a quantity discount program for certain Cattle-Pak customers in later 1971 and continued the program at least through June of 1975, despite serious reservations about its ability to justify the discount on the basis of its costs. By these assertions, Bagley apparently implied that IBP favored certain customers in its pricing policies.

D. *IBP's Response.*

In a letter dated August 1, 1979, IBP declined Congressman Smith's invitation to testify. The letter sharply criticized Congressman Smith and his conduct of the Subcommittee's investigation. IBP accused Smith of "demonstrable prejudice" against IBP and "obvious ulterior motives"—"to make political capital" and "to aid a friend and political crony," presumably Lex Hawkins, in antitrust litigation against IBP. Explaining its decision to reject Smith's invitation, IBP wrote:

> Because of your plain prejudice against us and your unwillingness in the past to abide by due process and the rule of law, we were initially inclined simply to reject your invitation and, when appropriate, tell our story in the courts or before congressional committees having jurisdiction over the meat industry where we would be fairly treated. But your attacks upon us and the distortions of the truth occurring in your hearings

[12] Cattle-Pak is IBP's registered trademark for its product consisting of the four primal cuts from a whole beef carcass—loins, ribs, rounds and chucks—sold in boxes as a unit.

have reached such an extreme that we owe those persons who deal with us on a day-to-day basis and whose trust we have earned over the years a specific rebuttal of the accusations that have been made in your hearings and published by the press. Therefore, while we reject your invitation to appear at your hearings, we submit the following statement to show that our unwillingness to appear results not from an inability to refute the charges made against us, but instead from our firm conviction that we would not be provided a fair forum and would be used as simply another opportunity on your part to grab headlines by anti-IBP accusations. Accordingly, we ask that this letter be made part of the official proceedings of your Subcommittee.

We realize that our rebuttal will not have the least impact on you or on your continuing attacks on this Company, but we hope that open-minded members of your Subcommittee, the media, the cattle and beef industry, and the public who may read it will begin to question and not uncritically accept what you are saying.

In its thirty-one page letter, IBP responded to each charge made against it before the Subcommittee from the fall of 1977 to July of 1979. Approximately fourteen pages of the letter dealt with the charges made by Bagley, whom it characterized as "a disgruntled ex-IBP employee" who had "*stolen* IBP documents and misused IBP confidential information to defame and cause problems for IBP." (Emphasis added.)

Beginning with Bagley's charge of yield misrepresentation, IBP stated that "[b]ecause the formula and the role of the primal yield are complex, Bagley was able to *conceal the truth* in confusion * * *." (Emphasis added.) In an attempt to elucidate, IBP explained that it guaranteed its customers a price per hundredweight on its boxed beef, necessarily based, because all cattle are different, on an assumed yield. Although the actual yield varied, buyers were unaffected because they made their purchasing decisions based on the price per hundredweight. In guaranteeing its price based on

an assumed yield, IBP took the risk that the actual yield would fall short of the assumed yield, and reaped the benefits when the actual yield exceeded the assumed yield. IBP also maintained that the gradual increase in its stated yields resulted from improved production techniques and leaner, better-yielding cattle, rather than an attempt to correct an earlier misrepresentation as Bagley claimed.

Next IBP responded to Bagley's allegation of preferential pricing:

> Although Bagley admitted that he did not know the origins or rationale of IBP's Cattle-Pak formula pricing to the Waldbaum chain, he felt free to suggest that it was illegal, below-cost pricing used by IBP as a tool to break into the New York market. The facts are otherwise.

IBP explained that when it finally persuaded Waldbaum to accept boxed beef despite bitter union opposition, it developed a special packaging suitable for the New York market, which required a new and different pricing formula. IBP conceded that Waldbaum's service fees were lower than those of other New York buyers, but attributed this difference to an agreement between IBP and Waldbaum, wherein IBP promised that service fees would not increase in return for Waldbaum's commitment to pioneer in the establishment of Cattle-Pak on the east coast.

Finally, IBP addressed the quantity discount program that Bagley described, stating that "Bagley's version of IBP's quantity discount program is *absolutely false*, and, we believe, *constitutes perjury* for which he should be cited." (Emphasis added.) IBP admitted offering a quantity discount, but asserted that it offered the discount to all its customers that purchased the requisite quantity. In addition, IBP maintained that it discontinued the program in September of 1973, pending a long-range cost accounting study to identify and quantify those savings "believed to be inherent" in volume purchases. According to IBP, "Bagley was intimately involved in the termination of the program and his attempt to suggest that it was not then terminated is *clear perjury.*" (Emphasis added.) IBP went on to say that

"Bagley *again perjured himself* by suggesting that [certain rebate checks] had anything to do with the [quantity discount program] * * * [emphasis added]. As Bagley well knows, that occasion represented a special one-time price reduction program under which IBP rebated $8 per head to *all* customers purchasing *any* quantity of Cattle-Pak during [a given period]."

In closing, IBP stated, "we have demonstrated that Bagley's stories about illegal or questionable conduct by IBP are false." IBP went on to say that Bagley's claim that he met with Krieger and others "to prevent a massive take-over by IBP of the packing industry" was

> simply a fabrication to conceal the malice with which he sought to stir up trouble for IBP and to create a defense for IBP's breach-of-fiduciary-duty suit.
>
> * * * *
>
> Now, you have furthered his vendetta by providing him with a privileged forum in which to make his false representations and disclose confidential IBP documents and information. Bagley's testimony before your Subcommittee must be recognized as nothing but a malicious attempt to blacken IBP's name and belatedly manufacture a defense to IBP's breach-of-fiduciary duty [sic] suit.

E. *Dissemination of IBP's Response.*

IBP addressed its letter to Congressman Smith and sent copies to seventeen other members of the Subcommittee. The Subcommittee, contrary to IBP's explicit request, did not enter the letter into the record; nor did it formally release the letter to the news media. IBP also refused initially to release copies of the letter, but referred those requesting copies to members of the Subcommittee who had received copies or certain organizations that IBP learned had subsequently obtained copies. By mid-September of 1979, the media had widely reported IBP's response. Thereafter, IBP did, upon request, give copies of the letter to certain members of the news media.

In late 1979, IBP distributed additional copies of its response as part of a bound document containing IBP president Peterson's testimony before the Livestock and Grains Subcommittee of the House Agriculture Committee (Livestock Subcommittee). IBP sent this document to members of the Livestock Subcommittee, IBP's directors, officers, and plant managers, certain members (primarily officers) of various agricultural associations (for example, National Cattlemen's Association, Central States Association, Texas Cattle Feeders Association, National Pork Producers, American Farm Bureau), professors at several academic institutions, approximately fifty members of the news media, and other interested parties. IBP prefaced the document with a letter, explaining to each "Supplier, Customer or Other Business Friend of IBP,"

> Since you have a legitimate interest in the subject matter, we are making this document available to you. It is for your personal use (and/or the use of your company), and is not intended for republication or distribution to the general public. * * * [W]e want you to know the truth and not be misled by false accusations.

II. DISCUSSION.

A. *Libel and the People's Right to Petition.*

The first amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." This cases requires us to consider, for the first time, to what extent this constitutional guarantee limits a court's power to award damages for libel in an action predicated on nontestimonial communications made in the course of petitioning the government.

The people's right to petition the government for a redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It is "implicit in and fundamental to the very idea of a republican form of governance." *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) (citing *United States v. Cruikshank*,

92 U.S. 542, 552 (1875)). The government acts on behalf of the people and, "to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 137.

Sharing the "preferred place" accorded the first amendment freedoms in our system of government, the people's right to petition "has a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

> "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."

New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring in result) (quoting 1 Tucker, Blackstone's Commentaries (1803), 297 editor's appendix)). Preserving inviolate the people's right to petition the government is imperative "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

IBP unquestionably exercised its first amendment right to petition the government when it wrote to Congressman Smith and sent copies of that letter to other members of the Subcommittee. For nearly two years, the Subcommittee had investigated the meatpacking industry, of which IBP is a prominent member. During the hearings, witnesses specifically testified as to IBP's activities and intentions, in some cases charging IBP with specific acts of misconduct. By mid-1979, when Bagley testified, the Subcommittee had seemingly focused on IBP. Explicitly recognizing this in his

letter, Congressman Smith invited IBP to respond,[13] warning it that if the investigation resulted in legislation, it would be one of the companies "most affected."

In its letter, which IBP requested be included in the record,[14] IBP limited its discussion to issues directly relevant to the Subcommittee's investigation. IBP responded to the specific charges of misconduct made by witnesses who testified before the Subcommittee, explaining its own position and exposing the witnesses' potential biases and motives. In addition, IBP questioned the integrity of the investigation itself—charging Smith with improper motives, condemning his allegedly biased choice of witnesses, and criticizing the practices he employed to gain access to the Bagley Documents.

We believe that IBP also acted well within the scope of its first amendment right to petition when it selectively distributed copies of its letter to those who had a legitimate interest in the issues raised during the course of the Subcommittee's investigation. The right to petition means more than simply the right to communicate directly with the government. It necessarily includes those activities reasonably and normally attendant to effective petitioning. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 142-43; *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983). In this case, we need not delineate the outer limits of this right. The right to respond to charges of misconduct made before a congressional subcommittee necessarily includes some right to dis-

[13] For purposes of determining whether IBP exercised its first amendment right to petition the government, we deem it irrelevant that IBP wrote a letter, rather than sending a spokesperson to appear before the Subcommittee as Congressman Smith had requested.

[14] That Congressman Smith elected not to include the response in the record is, we believe, also irrelevant for purposes of determining whether IBP exercised its first amendment right to petition the government.

seminate this response to those who learned of the charges. To hold otherwise would render the right to respond virtually meaningless, particularly in a case such as this where the governmental body to whom the response was directed chose not to publicize it. The record in this case shows that IBP's limited publication of its response did not exceed the bounds of reasonableness.

Concluding that IBP was exercising its first amendment right to petition the government, we must next examine to what extent that right protects IBP from liability for the allegedly libelous statements it made in the course of petitioning. We begin by recognizing that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), even if made in the course of petitioning the government. Factual misstatements, whether intentional lies or careless errors, do not inform; they confuse and mislead.

Although not worthy of constitutional protection, erroneous statements of fact arise inevitably in the course of free and open communication between citizen and government. Punishing all such errors, whether by sanction or civil liability, would induce a cautious and restrictive exercise of the constitutionally guaranteed right to petition. Requiring citizens to guarantee the accuracy of statements made in the course of petitioning the government, at the risk of multimillion dollar libel judgments, would lead to intolerable self-censorship, deterring not only falsity but truth as well. As the Supreme Court recognized in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 341, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."

1. *Absolute Privilege.*

A witness actually testifying before a legislative committee, like a witness testifying in court, enjoys absolute immunity from liability for defamation for statements made that are pertinent to the subject of inquiry or responsive to ques-

tions asked. *See, e.g., Bio/Basics International Corp. v. Ortho Pharmaceutical Corp.*, 545 F. Supp. 1106, 1115 (S.D.N.Y. 1982) (applying common law of New York); *Jennings v. Cronin*, 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978); *Logan's Super Markets, Inc. v. McCalls*, 343 S.W.2d 892, 894-95 (Tenn. 1961); *Sherrard v. Hull*, 456 A.2d 59, 63 (Md. Ct. Spec. App.), *aff'd mem.*, 460 A.2d 601 (Md. 1983) (relied not on the common law privilege but on the first amendment right to petition). *See generally* 53 C.J.S. *Libel and Slander* § 105 (1948); W. Prosser, *Law of Torts*, § 114, at 781-82 (4th ed, 1971). The Supreme Court of Appeals of West Virginia, in *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), extended this absolute immunity from defamation liability to all communications made in the course of petitioning the government, whether or not such communications were made in the confines of an actual proceeding. In so doing, the West Virginia court relied on the so-called *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine finds its origin in the Supreme Court's 1961 decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra.* There, a group of trucking companies and their trade association brought an action against a group of railroads, a railroad association and a public relations firm, alleging that the railroads had violated the Sherman Act by conducting a publicity campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." *Id.* at 129. The Supreme Court concluded that "the Sherman Act does not prohibt two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. In so concluding, the Court relied in part on its determination that, in light of the constitutionally guaranteed right to petition, a contrary conclusion "would raise important constitutional questions." The Court recognized, in closing, that

"[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

Ten years after *Noerr*, the Supreme Court explained the decision as resting squarely on the constitutionally guaranteed right to petition the government. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), one group of highway carriers brought an action against another group of highway carriers, alleging that the defendants violated the Sherman Act by instituting state and federal administrative and judicial proceedings to resist and defeat plaintiffs' applications to acquire, transfer, or register operating rights. Relying entirely on the people's right to petition and of association, the Court reiterated that mere attempts to influence the passage or enforcement of laws do not violate the Sherman Act. *Id.* at 510-11. The Court remanded the case for trial, however, because it concluded that the allegations in the complaint, which the district court dismissed, on their face fell within the "sham" exception recognized in *Noerr*. The complaint alleged that defendants set up a trust fund to finance opposition to all plaintiffs' applications "with or without probable cause and regardless of the merits." *Id.* at 518. The Court held that this, if true, constituted a violation of the antitrust laws: "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another." *Id.* at 515.

West Virginia's Supreme Court of Appeals in *Webb v. Fury*, *supra*, relied on the *Noerr-Pennington* doctrine to issue a writ of prohibition preventing a trial court from proceeding with a defamation action. There, the allegedly libelous communications included an administrative complaint lodged

with the United States Department of Interior's Office of Surface Mining (OSM) and a request for an evidentiary hearing before the United States Environmental Protection Agency (EPA). These communications charged the plaintiff, a coal company, with violating federal law and, according to the plaintiff, were made maliciously and with knowledge of their falsity. The West Virginia court concluded that these communications constituted "classic examples" of petitioning activity and, as such, were absolutely privileged under the *Noerr-Pennington* doctrine. The court described the doctrine as "a principle of constitutional law which bars litigation arising from injuries received as a consequence of first amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." *Webb v. Fury*, *supra*, 282 S.E.2d at 37. The state court rejected the plaintiff's contention that the defendant's activities were not entitled to protection because they fell within the "sham" exception. *Id.* at 39.

Justice Neely, dissenting, asserted that the majority overstated the reach of the *Noerr-Pennington* doctrine. He rejected the conclusion that the doctrine created blanket immunity for all activities that look like petitioning, relying on the "sham" exception. This exception, according to the dissent, "uncovers from immunity *any* course of conduct which in fact is not petitioning activity, despite its appearance." *Id.* at 46. When putative petitioners know there is no basis for their claims, the dissent concluded, they are not petitioning the government, and if they are not petitioning the government, they are not entitled to immunity.

We agree with Justice Neely that the *Webb* majority overstates the reach of the *Noerr-Pennington* doctrine.[15] Courts have indeed extended the doctrine beyond the antitrust context to a limited extent. For example, certain efforts

[15] We have said in the past that "the basis of this doctrine is not an all-encompassing First Amendment protection." *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1267 n.14 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

to influence the government do not give rise to liability for tortious interference with business. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (economic boycott of white merchants designed to secure elected officials' compliance with demands for racial equality and integration); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (defendant investors initiated an investigation by the Securities and Exchange Commission which forced plaintiff to postpone its planned public offering); *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) (defendant successfully sought an injunction against city officials preventing the award of a public contract to a competitor); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1315 (8th Cir.) (convention boycott against Missouri to encourage ratification of the proposed equal rights amendment), *cert. denied*, 449 U.S. 842 (1980); *First National Bank v. Marquette National Bank*, 484 F.Supp. 514, 524-25 (D. Minn. 1979) (defendant successfully lobbied for legislation restricting plaintiff's right to engage in a bank credit card program), *aff'd*, 636 F.2d 195, 197 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *Sierra Club v. Butz*, 349 F.Supp. 934, 938 (N.D. Cal. 1972) (defendants sought to persuade the government to abandon its intention to permit logging in a particular wilderness area, despite a preexisting contract allowing plaintiff to harvest timber in that area). In addition, courts have extended the *Noerr-Pennington* doctrine to immunize defendants seeking to influence government action from liability for alleged conspiracies under 42 U.S.C. § 1983, *see, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) (defendants successfully petitioned the city's board of directors to rezone a particular site to prevent plaintiffs from constructing a high rise apartment complex on that site) and 42 U.S.C. § 1985, *see, e.g., Stern v. United States Gypsum, Inc., supra*, 547 F.2d at 1344 (defendant corporation filed an allegedly false complaint with the Internal Revenue Service charging the plaintiff, the agent who conducted its audit, with professional misconduct).

This limited extension of the *Noerr-Pennington* doctrine does not support the conclusion that one who seeks to influence governmental action escapes liability for any and all injuries inflicted in the course of genuine petitioning activity. Rather, it simply establishes that courts may not award compensation for the consequences of protected activity. Courts can and do award damages for injuries inflicted as a result of unprotected activity.

The cases establish, in our view, two classes of unprotected activity. The first constitutes those activities which come within the "sham" exception. These are activities which, although "ostensibly directed toward influencing governmental action," are actually nothing more than an attempt to harm another. *Noerr*, *supra*, 365 U.S. at 144. The Fifth Circuit, in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1297-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), relied on the "sham" exception to hold *Noerr-Pennington* inapplicable to allegedly false communications directed to the government. That court, like the *Webb* dissent, reasoned that false communications cannot be considered an attempt to influence governmental policies and thus do not constitute genuine petitioning activity.

The other class of unprotected activity includes those activities which do not qualify for protection even if undertaken in a genuine attempt to influence governmental policy. The first amendment does not protect violence. *Noerr-Pennington*, therefore, does not preclude tort liability for business losses caused by violence that is part of an otherwise legitimate economic boycott. *See NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at 916. Similarly, the first amendment affords no protection to illegal acts. Thus, courts have held that *Noerr-Pennington* does not immunize a defendant from liability for injuries resulting from governmental action secured by illegal means. *See, e.g., Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2122 (1983); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*,

440 F.2d 1096, 1099 (9th Cir.) *cert. denied*, 404 U.S. 826 (1971). Moreover, the first amendment does not absolutely protect defamatory speech. *See Gertz v. Robert Welch, Inc.*, *supra*. Therefore, *Noerr-Pennington* does not necessarily and absolutely preclude liability for damages resulting from defamatory statements made in the course of petitioning the government. Thus even where federal courts have dismissed other claims on *Noerr-Pennington* grounds, they have declined to hold pendent state law defamation claims precluded by *Noerr-Pennington*. *See Stern v. United States Gypsum, Inc.*, *supra*, 547 F.2d at 1345; *Gorman Towers, Inc. v. Bogoslavsky*, *supra*, 626 F.2d at 615-16.

We believe extending absolute immunity to all communications made in the course of petitioning the government, whether or not such communications were made in the confines of an actual proceeding, is unwarranted by the *Noerr-Pennington* doctrine and also unwise. Sound considerations underlie the common law's limitation of the absolute privilege's applicability to those who actually testify. In that context, safeguards exist to ensure that absolute immunity from defamation liability is not abused. A witness testifies pursuant to the supervision and control of the presiding officer, who may reprimand, fine, and punish the witness as well as strike from the record statements that exceed proper bounds. In addition, a witness testifies under oath and thus is subject to prosecution for perjury.

Extending absolute immunity from defamation liability to situations where alternative safeguards do not exist to prevent attacks upon reputation requires a complete sacrifice of the value served by the law of defamation. Such a sacrifice is, in our view, unacceptable. As Justice Stewart said so well, "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). Accommodating, to some degree, the state's legitimate interest

in redressing wrongful injury to reputation is essential, even when that injury is inflicted during the course of genuine petitioning activity. We reject, therefore, IBP's contention that statements made in the course of petitioning the government are absolutely privileged.[16]

2. *Qualified Privilege.*

Recognizing the importance of petitioning the government, the Court of Appeals for the District of Columbia Circuit has granted a broad common law immunity from liability for defamation in nontestimonial communications directed to the government. *See Webster v. Sun Co.*, 731 F.2d 1 (D.C. Cir. 1984). In that case, a Sun Company employee sent an allegedly libelous intra-office memorandum concerning a fuel saving device invented and promoted by the plaintiffs to an employee of the Congressional Research Service who had previously expressed interest in the device. The court concluded that the statements, which it characterized as "unsolicited," were "absolutely privileged" provided that 1) the communicator would not have made the statements but for an intention to inform the legislative body on a subject properly within its jurisdiction, and 2) the statements had some relation to the legitimate legislative business to which they were addressed. *Id.* at 5.[17]

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[16] Our attention has been directed to the recent case of *Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984), in which the Fourth Circuit also determined that the petition clause does not confer an absolute privilege. The Supreme Court has granted certiorari in the *Smith* case. 53 U.S.L.W. 3390 (U.S. Nov. 27, 1984) (No. 84-476).

[17] Although purportedly defining the scope of the absolute privilege at common law, the D.C. Circuit in effect created a qualified privilege. An absolute privilege is by definition just that—absolute, without regard to the defendant's purpose or motive or the reasonableness of his or her conduct. W. Prosser, *supra* p. 19, § 114, at 776. Such a privilege protects the defendant from liability for defamation even if he or she deliberately lies or is motivated purely by personal ill will toward the plaintiff. Neither statement, on the other hand, finds sanctuary under *Webster*. *Webster* protects

(footnote continued on next page)

The protection afforded under these common law principles by the *Webster* court is not applicable here because such protection does not extend to republications. In our view, the constitutional right to petition, although not entitled to absolute protection, must afford a citizen under attack by a congressional committee and the committe's witnesses with attendant publicity at least a qualified privilege to respond to such charges and to make reasonable republications thereof. We think that the first amendment protections afforded the press against liability for defamation reflect an analogous principle to be applied here.

Beginning in 1964 with *New York Times Co. v. Sullivan*, *supra*, the Supreme Court prohibited public officials from recovering damages for defamatory falsehood absent proof that the libelous statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The Court extended this standard of liability in 1967 to defamation actions brought by "public figures," individuals "who do not hold public office • • • [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result). In so doing, the Court reasoned that

> "public figures," like "public officials," often play an influential role in ordering society. • • • Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."

(footnote continued from preceding page)

only those statements made for the purpose of informing the legislature. *Webster v. Sun Co.*, *supra*, 731 F.2d at 5. Thus, the privilege approved by the D.C. Circuit is not absolute, but qualified.

Id. By requiring "public persons" to prove "actual malice" and thus affording a substantial measure of protection from defamation liability to their critics, the Court has provided the necessary insulation for certain of the fundamental interests which the first amendment was designed to protect—the rights of the press and the public to inform and be informed as to the conduct and character of those who play an influential role in ordering society.

We believe that the "actual malice" standard of liability provides the "necessary insulation" for the first amendment interests at stake in this context as well. Requiring plaintiffs to prove, by clear and convincing evidence, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971) (plurality opinion by Brennan, J.), that statements made in the course of petitioning are made with knowledge that they were false or in reckless disregard of whether they were false or not affords substantial protection to petitioners. "Actual malice" is not measurable simply by reference to the conduct of a reasonably prudent person; rather, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Recklessness cannot be inferred from the mere combination of falsehood and the defendant's general hostility toward the plaintiff. *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 10 (1970).

In *Gertz v. Robert Welch, Inc., supra*, a majority of the Supreme Court recast the rationale behind *New York Times* and its progeny, focusing not on the heightened interest in unfettered discussion with respect to public persons, but instead on the status of the person defamed. Only this way, the Court determined, could it strike an appropriate balance between the competing interests at stake. In so concluding, the Court reiterated its conviction that the *New York Times* privilege should be available to "publishers and broadcasters of defamatory falsehood concerning public officials and public fig-

ures." 418 U.S. at 343. The decisions in *New York Times* and *Curtis Publishing*, the Court stated, are correct

> but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accomodation between this concern and the limited state interest present in the context of libel actions brought by public persons.

Id.

Gertz identified two alternative bases for characterizing a person as a public figure for purposes of media comment. In some instances, a person may occupy a position "of such persuasive power and influence" or "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* at 345, 351. "More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351. In either case, such persons have "assumed roles of especial prominence in the affairs of society" and thus "invite attention and comment." *Id.*

Public persons share two characteristics, according to the Court, which at least theoretically distinguish them from private individuals for purposes of diminishing the state's interest in compensating them for injuries to their reputations. First, public persons are less vulnerable to injury because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344 (footnote omitted). Second, having assumed the risk of public scrutiny by becoming involved in public affairs, public persons are less deserving of recovery than are private individuals.

For purposes of this case, we need not decide whether Bagley is a limited public figure within the meaning of *Gertz*—that is, for purposes of media comment. He is, in our view, analogous to a limited public figure in the context of petitioning the government. A limited public figure, by playing an influential role in resolving a public controversy, invites media attention and comment germane to his participation in that controversy. Similarly, Bagley, by playing an influential role in the legislative process, invited attention and comment germane to his participation by others also participating in that process.

Bagley's testimony before the Subcommittee in July of 1979, like his earlier cooperation in preparation for the hearing, was given pursuant to a subpoena and thus cannot objectively be characterized as voluntary. Prior to that time, however, he did assume a voluntary role in the ongoing controversy as to whether and, if so, to what extent IBP was engaging in anticompetitive conduct. As we have previously observed, Bagley voluntarily met and cooperated with several antitrust lawyers, sharing with them information he gained during his tenure at IBP and allowing them to examine the Bagley Documents. He did so, according to his own testimony before the Subcommittee, because he "could see that somebody somehow had to stand up and be counted, or IBP was going to swallow up all of its smaller competition." He thought that talking with the lawyers "might be a starting point of [his] becoming involved in at least trying to prevent a massive takeover by IBP of the packing industry." In addition, Bagley, although under subpoena, can hardly be described as a recalcitrant and unwilling witness.

Like a limited public figure suing a media defendant for defamation, Bagley's status as an active participant in the legislative process diminishes the state's interest in protecting him from defamation by another participant. As a participant, he has proven access to the forum in which he was allegedly defamed. He therefore has a realistic opportunity to counteract false statements, minimizing the adverse

impact on his reputation. In addition, unlike publication by the communications media, the defamation itself occurs here in a limited forum, markedly reducing the scope of the injury. Depending on the nature of the proceeding and the charges made, the media may, as it did in this case, relay the communication to the general public. When this happens, however, the response will frequently be equally newsworthy. All these considerations render a participant in legislative proceedings less vulnerable to injury from defamation than one who is in no way involved. Thus the state's interest in protecting a participant is reduced. In addition, persons who through their own actions are in a position to influence the legislative process must accept the risk of scrutiny by other participants in the process. Having accepted the risk, they are less deserving of recovery for injury as a result of defamatory falsehood.

For all these reasons applicable to Bagley, whose status we have said is analogous to a limited public figure in media comment, we conclude that the "actual malice" standard of liability applies here and that standard is an appropriate accommodation between society's interest in immunity from defamation liability for those who communicate with the government and the limited state interest in compensating the other participants for defamation in that context.[18] Having so concluded, we must reverse the libel judgment. Proving that a statement was made with "actual malice"—that

[18] The Supreme Court reached a similar conclusion, but based on the common law instead of the first amendment, in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845). In that case, the Court recognized that, at common law, petitions to government for redress of grievances were privileged communications. However, that privilege was not absolute. The Court stated: "[P]roof of express malice in any written publication, petition, or proceeding, addressed to [a court or legislative body], will render that publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. * * * [F]alsehood and the absence of probable cause will amount to proof of malice." *Id.* at 291.

is, with knowledge that it was false or in reckless disregard of its falsity—necessarily includes proving the statement was false. In this case, the instructions absolved Bagley of his initial burden of proving falsity. The district court instructed the jury that the defamatory statements in IBP's letter were libelous per se. This, according to the court, created "a legal presumption of their falsity thus shifting to [IBP] the burden of proving the truth of the statement." The punitive damages instruction, which required proof of "actual malice"[19] did not cure or render harmless this error. This instruction related to damages only, not to liability, and became relevant to the jury's deliberation only after it determined liability under the instructions pertaining to libel. Furthermore, the punitive damage instruction contained error in that it failed to clearly place the burden of proving actual malice by clear and convincing evidence on Bagley.

IBP argues that Bagley cannot prove "actual malice" as a matter of law. We decline to decide that issue at this time. Although it lies well within our appellate power in the first amendment area to do so, *see, e.g., New York Times Co. v. Sullivan, supra*, 376 U.S. at 284-86; *Greenbelt Cooperative Publishing Association v. Bresler, supra*, 398 U.S. at 11, we believe that in this case that determination should be left to the district court on remand. That court presided over twelve days of trial, gaining a far superior vantage poit from which to view the evidence and determine whether Bagley

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[19] The punitive damages instruction provides in part:

> If you find that plaintiff has established the essential elements of his libel claim and if you find, on the basis of clear and convincing evidence that the defendant acted with actual malice in publishing the writing in question, then you may award the plaintiff punitive damages in addition to the actual damages assessed.

The district court further instructed the jury that "[a] publication is made with 'actual malice,' as that term is used in this charge, if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not."

introduced evidence of "actual malice" sufficient to merit jury consideration. If the district court decides that Bagley did not introduce sufficient evidence of actual malice to merit jury consideration, it should then enter judgment for defendant on the libel claim notwithstanding the verdict. If it decides that he did introduce sufficient evidence on this subject, there should then be a new trial on the libel claim, with instructions to be given in accordance with our opinion.

B. *Tortious Interference with Employment.*

At the time he testified before the Subcommittee, Bagley worked for Dubuque Packing Company (Dubuque), a company that both competed and dealt with IBP.[20] Dubuque had employed Bagley since early 1979 as general manager of one of its fabricating plants, primarily responsible for marketing and selling Dubuque's boxed beef. On July 30, 1979, six days after Bagley testified, Dubuque discharged him, along with about ninety other employees, explaining that Dubuque intended to cut back on its boxed beef operation. With one six-month exception,[21] Bagley has not been employed since, despite several hundred applications and inquiries.

At trial, Bagley maintained that his discharge by Dubuque and his subsequent inability to obtain other employment resulted from IBP's tortious interference with his existing and prospective employment relationships. The

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[20] from mid-1974 to at least the time of trial, IBP and Dubuque had a mutually beneficial arrangement, designed to avoid transportation expense and to ensure a consistent supply of carcasses for their fabricating plants and a consistent demand for carcasses from their slaughtering plants. In essence, IBP agreed to supply carcasses from its slaughtering plant in Denison, Iowa to Dubuque's Denison processing plant and to buy carcasses for its fabricating plant in Dakota City from Dubuque's nearby slaughtering facilities.

[21] Bagley worked as president of Southwest Beef from June to December of 1981, when the company closed its plants.

jury agreed, awarding Bagley $650,000 compensatory and punitive damages for interference with his employment at Dubuque and $350,000 compensatory and punitive damages for interference with prospective employment. On appeal, IBP argues that both these verdicts must fall because they are "hopelessly tainted by the libel and privacy portions of the trial."

Although we reject this argument, we do believe that the verdict for interference with prospective employment must fall. The only evidence in the record that arguably constitutes interference with Bagley's prospective contractual relationships is IBP's publication and circulation of the allegedly libelous letter. For that reason, Bagley's inability to obtain subsequent employment is more appropriately characterized as an element of damages for libel and an award upon any separate claim could well be a duplication of damages. If, on remand, Bagley establishes IBP's liability for libel, he should be allowed to recover for the adverse impact on his future employability.

The evidence supporting Bagley's claim of tortious interference with existing employment, on the other hand, is entirely independent of the alleged defamation. On two different occasions, IBP executives spoke with Charles Stolz, the president of Dubuque, and indicated their displeasure about the employment relationship then existing between Bagley and Dubuque. In the spring of 1979, IBP's president, Robert Peterson, told Stolz that he and other IBP employees were "uncomfortable" dealing with Bagley because of their ongoing dispute. Later that year, just before Bagley was to appear before the Subcommittee, the co-chairman of IBP's board of directors reminded Stolz, in a manner that Stolz characterized as "joking," that Dubuque was paying Bagley while he testified against IBP. Because this evidence presents a basis entirely independent of the alleged libel upon which the jury could reasonably conclude that IBP caused Dubuque to discharge Bagley, we believe that the judgment for tortious interference with existing employment must stand.

C. *Fair Trial.*

IBP also contends that the district court denied it a fair trial by allowing the introduction of prejudicial and irrelevant evidence and by permitting improper closing argument. After carefully reviewing the record, paying particularly close attention to IBP's specific allegations of error, we cannot agree.

The admission or exclusion of evidence and the latitude afforded counsel in jury argument necessarily lie within the sound discretion of the district court. *Skogen v Dow Chemical Co.*, 375 F.2d 692, 704-05 (8th Cir. 1967). Our role is limited to reviewing for a clear abuse of discetion by the district court. *Wilfing v. General Motors Corp.*, 685 F.2d 1049, 1052 (8th Cir. 1982). We give great deference to the judge who saw and heard the evidence and the arguments. *United States v. Bohr*, 581 F.2d 1294, 1299 (8th Cir.), *cert. denied*, 439 U.S. 958 (1978). That judge, not this court, has "the feel of the case" and thus has "a superior vantage point from which to oversee the factual presentation of the case and the conduct of counsel." *Skogen v. Dow Chemical Co., supra*, 375 F.2d at 705-06.

We reject IBP's contention that the trial court's admission of evidence deprived it of a fair trial. We do not believe that the closing argument presented by Bagley's attorney so exceeded proper bounds as substantially to affect the fairness of the trial as a whole . Our affirmance on this issue, however, is not binding on remand. The previous trial and now this appeal have, in our view, crystallized the issues in this case. It may well be that on trial the district court will find it expedient to reconsider the probative value of particular pieces of evidence and once again determine whether that value is outweighed by the danger of unfair prejudice.

D. *Prejudgment Interest.*

In this diversity case, Iowa law governs the amount of prejudgment interest due on the judgment. *Sedco International, S.A. v. Cory*, 683 F.2d 1201, 1212 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982). Section 535.3 of the Iowa Code provides that "[i]nterest shall be allowed on all money due on judg-

ments and decrees of courts at the rate of ten percent per year * * *. The interest shall accrue from the date of the commencement of the action." Iowa Code Ann. § 535.3 (West Supp. 1984-1985).[22] Pursuant to the statute, the district court awarded Bagley prejudgment interest on the entire judgment in the amount of $2.33 million. IBP contests this award on a number of grounds. Because of our disposition of this case, we need address only those arguments which are relevant to the district court's award of prejudgment interest on the $650,000 judgment for tortious interference with existing employment.[23]

First, IBP argues that if any of Bagley's damages were sustained after the complaint was filed, interest should have accrued only from the date of injury, despite the language in section 535.3. *See Sedco International, S.A. v. Cory, supra*, 683 F.2d at 1211-12. The problem in this case is determining whether the $150,000 compensatory damage award for tortious interference with existing employment was for damages incurred before or after October 4, 1979, when the complaint was filed. In the absence of evidence to the contrary, we must assume that the losses for which Bagley was being compensated by this judgment occurred when he was discharged on July 30, 1979 and immediately thereafter. Such an assumption is particularly warranted where, as in this case, there was a separate compensatory damage award for tortious interference with future employment. Thus, we reject this contention by IBP.

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[22] The statute, amended to its present form on March 28, 1980, applies to judgments entered on and after January 1, 1981, even if the action was filed prior to that date. *Janda v. Iowa International Hydraulics, Inc.*, 326 N.W.2d 339, 343-44 (Iowa 1982).

[23] In addition to the arguments discussed below, IBP contends that prejudgment interest on libel judgments impermissibly chills speech and improperly compels retraction and settlement. Because we reverse the libel judgment, we do not address this issue. If the occasion arises, IBP may raise this issue anew before the district court on any retrial.

IBP also argues that prejudgment interest on future damages was inappropriate because the district court instructed the jury to calculate the present value of Bagley's future damages. For reasons already discussed, we are assuming that the $150,000 compensatory damage award was for past injury. We therefore need not address the merits of this argument.

Finally, IBP argues that prejudgment interest does not run on punitive damages before judgment. The district court rejected this argument, relying on the "clear mandate" in section 535.3 that interest on all judgments "shall accrue from the date of the commencement of the action." Although the statute on its face admits of no exception for punitive damage awards, we cannot agree with this construction. Interest is compensation for the deprivation of the use of money. Punitive damages do not accrue, however, until they are awarded in a judgment. It would be anomalous indeed to compensate the plaintiff for the deprivation of the use of money to which he has no claim of right. Recently, the Supreme Court of Iowa has held, in accordance with decisions issued before enactment of section 535.3 that interest does not run on punitive damages before judgment. *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984).

III. CONCLUSION.

Having concluded that Bagley cannot recover for defamation on the basis of IBP's letter to the Subcommittee absent "actual malice," we reverse the libel judgment and remand that claim to the district court. We also reverse the judgment for tortious interference with future employment. If, on remand, Bagley successfully establishes IBP's liability for libel, he should be allowed to recover damages for loss of future employability resulting from the defamation. Finally, we affirm the judgment for tortious interference with existing employment totalling $650,000, with prejudgment interest calculated only on the compensatory damages

of $150,000.[24] We remand for modification of the judgment, for a determination by the district court, pursuant to IBP's motion for judgment NOV, of whether Bagley introduced sufficient evidence of actual malice to merit consideration by the jury, and for such further proceedings as may be appropriate in light of this opinion. The parties shall bear their own costs on appeal.

FAGG, Circuit Judge, dissenting.

I accept the basic analytic framework developed by the court. Like the court, I conclude that I.B.P.'s actions constitute legitimate petitioning activities that are entitled to some degree of first amendment protection. I also agree with the court that the first amendment does not absolutely insulate I.B.P.'s actions from liability for defamation, but rather provides these actions with a qualified privilege that may be lost under some circumstances. Further, to determine the scope of this qualified privilege, the court must focus on the status of the person defamed; and if the person defamed is a limited purpose public figure, that person must prove "actual malice" in order to overcome the qualified privilege and recover.

Despite basic agreement with the court's approach, I disagree with its conclusions. Unlike the court, I conclude that Bagley's actions have not stripped him of his status as a private individual. Further, even if Bagley has become a limited purpose public figure and as a result is required to prove "actual malice," the district court in fact instructed the jury on the issue of actual malice and the jury specifically found that I.B.P. acted with actual malice. This finding was separate and distinct from any other issue decided by the jury, and after an independent review of the evidence,

[24] No issue has been raised on appeal concerning the rate applied to post-judgment interest which has been calculated under the Iowa statute. For a discussion of the rate applicable to a judgment in federal court, *see The Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382 (8th Cir. 1983).

New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964), I conclude that Bagley presented clear and convincing evidence of actual malice, *Bose Corp. v. Consumers Union of the United States*, 104 S. Ct. 1949, 1967 (1984). Finally, I disagree with the court's reversal of the jury's award of damages on Bagley's interference with future employment claim. While such an award will be duplicative if Bagley ultimately succeeds on his libel claim, Bagley has yet to do so. Consequently, any decision on the propriety of this award is premature. Because of these basic disagreements, I respectfully dissent.

The court's conclusion that Bagley is a limited purpose public figure flows largely from its determination that Bagley played an "active" and "influential" role in the legislative process. *Ante* at 29, 30. This conclusion, particularly in light of the significant burden such a decision imposes on Bagley, is misplaced. Bagley's only involvement in the legislative process was as a witness before the Smith subcommittee. He had no role in the subcommittee's policy determinations and did not, outside his specific testimony, attempt to lobby or persuade the subcommittee to take any particular action or position. Instead, Bagley made a single appearance before the subcommittee, under subpoena, and provided information relevant to that subcommittee's activity. Outside of this single appearance, Bagley had neither "proven access" to the legislative forum nor a "realistic opportunity" to counteract false statements made by I.B.P. *Ante* at 30.

Given these facts, I cannot conclude that Bagley played either an "active" or "influential" role in the legislative process. If he did, then virtually every witness appearing before a congressional committee will constitute an "active" and "influential" participant and like Bagley will lose his or her status as a private citizen. A mere witness can hardly be said to play "an influential role" in "resolving" a particular controversy, especially in the context of losing the mantle and protection of private person status. The court's conclu-

sion that such individuals have "accepted the risk" and are "less deserving of recovery" is remarkably harsh and ignores the valuable role these individuals play in our legislative process. This result will discourage citizens with relevant information from coming forward and, as a consequence, Congress will likely be deprived of a valuable source of information. Simply because an individual becomes "involved in or associated with a matter that attract[s legislative] attention" should not mean that this individual is "automatically transformed into a public figure." *Wolston v. Readers Digest Association*, 443 U.S. 157, 167 (1979).

I reach a similar result when I examine Bagley's overall involvement in the I.B.P. controversy. Throughout this controversy, Bagley sought no public audience. His meetings with other individuals were private and nonpublicized and, in fact, were not initiated by Bagley. Even his congressional testimony was not objectively voluntary since, as the court notes, it was given under subpoena. Further, after his testimony, Bagley conscientiously avoided the media and made no public comment. Finally, any media attention that Bagley may have received following the publication of the Peterson letter cannot transform an otherwise private individual into a limited purpose public figure. Under any analysis, I simply cannot conclude that Bagley has so "thrust [himself] to the forefront of [this] particular public controversy • • • [that] [h]e has relinquished • • • his interest in the protection of his own good name." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Consequently, unlike the court, I believe Bagley retains his status as a private citizen.

Although it is my contention that Bagley retains the status of a private citizen, the first amendment values implicated by I.B.P.'s petitioning activities are still entitled to constitutional protection. The necessary constitutional protections were enumerated by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the Supreme Court outlined the constitutional limitations on a private

citizen's right to recover for defamation in the context of media comment. While the present case involves the first amendment right to petition, I believe the constitutional limitations found in the area of media comment are equally applicable to the area of first amendment petitioning.

The constitutional limitations outlined by the Supreme Court in *Gertz* are essentially three-fold. First, although a state may define the appropriate standard of liability for defamation, it may not impose liability without fault. *Id.* at 347. Second, unless actual malice has been proven, the private citizen may recover only actual damages. *Id.* at 349. Third, punitive damages cannot be recovered without proof of actual malice. *Id.* at 350. In this case, the district court's instructions comply with the *Gertz* limitations and consequently provide I.B.P.'s first amendment interests with "the 'breathing space' that they 'need • • • to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

On the issue of liability, the district court required Bagley to prove by a preponderance of the evidence that I.B.P. "published the [Peterson] letter with *knowledge* that it was false." This instruction meets the *Gertz* fault requirement. The fact that the district court also instructed the jury that words such as "stole" and "perjury" are libelous per se and create a "presumption of • • • falsity" did not relieve Bagley of the burden of proving fault. Despite this presumption, Bagley was still required to prove that I.B.P. published these statements with knowledge that they were false. Falsity and fault are separate and distinct concepts and the Supreme Court had rejected the argument that falsity is necessarily an indiction of fault. *See Gertz*, 418 U.S. at 347 n.10. *Cf. Bose Corp.*, 104 S. Ct. at 1965.

The district court's instructions are also consistent with the second *Gertz* limitation. On the issue of compensatory damages, the district court, while at one point speaking of a "presumption of injury," specifically limited Bagley's recovery of compensatory damages to those "which were *directly*

and *proximately* caused by the alleged libel." This instruction clearly limited Bagley's compensatory damages to those which he could actually establish.

Finally, with respect to the third *Gertz* limitation, the jury was instructed that Bagley could recover punitive damages only if he could prove "on the basis of clear and convincing evidence that the defendant acted with actual malice." The district court defined the term actual malice as "[a] publication • • • made with knowledge that it is false, or with reckless disregard of whether it is false or not." These instructions are consistent with the *Gertz* limitation on the recovery of punitive damage and properly define both the term actual malice, *New York Times, Inc. v. Sullivan*, 376 U.S. at 280, and the necessary burden of proof, *Rosenbloom v. Metromedia*, 403 U.S. 29, 30 (1971). Further, the court's gratuitous finding that "the punitive damage instruction contained error in that it failed clearly to place the burden of proving actual malice by clear and convincing evidence on Bagley," *ante* at 32, is inappropriate. I.B.P. concedes in its brief that the district court's instruction placed the burden of proving this issue on Bagley. In addition, I.B.P. has not even raised this issue on appeal.

Even if Bagley is a limited purpose public figure and is required to prove actual malice, I conclude that the jury's verdict should stand. The jury awarded Bagley punitive damages. This award was separate from the award of compensatory damages and was specifically based on the jury's determination that I.B.P.'s actions were motivated by actual malice. This independent determination in and of itself is sufficient to support both the compensatory and punitive damage awards in this case. As was stated by Chief Justice Warren in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967): "Although the 'actual malice' instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive how petitioner could have been prejudiced by that failure in view of the fact that the jury,

guided by 'actual malice' instructions awarded * * * punitive damages." *Id.* at 166 (Warren, C.J., concurring).

Further, in so far as the district court's presumption of falsity is concerned, this presumption was limited to the issue of liability for purposes of compensatory damages. The instructions on their face show that this presumption did not carry over to the issue of liability for punitive damages, the determination of which is independent from a determination of liability for compensatory damages. Consequently, any error the district court may have committed is nonprejudicial and may not be used by this court as a basis for disturbing the jury's verdict. *Brewer v. Jeep Corp.*, 724 F.2d 653, 656 (8th Cir. 1983) (citing *Paymaster Oil Mill Co. v. Weston*, 610 F.2d 501, 503 (8th Cir. 1979)). The court has forgotten that "[w]e have . . . come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered 'citadels of technicality.' " *McDonough Power Equipment, Inc. v. Greenwood*, 104 S. Ct. 845, 848 (1984) (quoting *Kotteakos v. United States*, 328 U.S. 750, 759 (1946)). I.B.P. received the fair trial to which it was entitled and this court should not, in light of the clear jury finding of actual malice, reverse the jury's determination.

As a final comment, I disagree with the court's reversal of the damages awarded Bagley on his tortious interference with future employment claim. While an award on this claim would be duplicative of a libel recovery, Bagley very simply has yet to recover on his libel claim. Until that recovery occurs, it is difficult to see how the award of damages for tortious interference with future employment can be duplicative. Rather than reversing this reward, the court should remand this portion of the action back to the district court subject to the ultimate determination of the libel issue.

I also conclude that there is sufficient evidence, independent of any evidence that might constitute protected petitioning activity, to support this claim. Prior to I.B.P.'s actions, Bagley was highly regarded in the meat industry, had a good reputation for honesty, ability, and integrity, and

received numerous offers of employment. Following his congressional testimony, however, Bagley was fired from Dubuque Packing at I.B.P.'s instigation. Additionally, Bagley was effectively "blacklisted" from the industry as a whole by I.B.P. and it was made clear to him that he should look for employment in another industry because he would never work in the meat industry again. The offers of employment stopped and Bagley was unable to obtain further employment in the meat industry. I believe that this evidence is sufficient to support the jury's verdict on the tortious interference with future employment claim.

In conclusion, contrary to the court, I would affirm the awards for libel and tortious interference with future employment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 79-4087

HUGHES A. BAGLEY,
Plaintiff,
vs.
IOWA BEEF PROCESSORS, INC.,
Defendant.

VERDICT OF THE JURY

Form No. 1

We find for the plaintiff on his claim for libel and assess the amount of his recovery at $1,000,000 actual damages and $5,000,000 punitive damages.

Foreman

Form No. 2

We find for the defendant on this claim.

Foreman

Form No. 3

We find for the plaintiff on his claim for invasion of privacy and assess the amount of recovery at $250,000 actual damages and $1,500,000 punitive damages.

Foreman

Form No. 4

We find for the defendant on this claim.

_____

Foreman

Form No. 5

We find for the plaintiff on his claim for intentional interference with contract and assess the amount of recovery at $150,000 actual damages and $500,000 punitive damages.

_____

Foreman

Form No. 6

We find for the defendant on this claim.

_____

Foreman

Form No. 7

We find for the plaintiff on his claim for intentional interference with the prospective contracts and assess the amount of recovery at $100,000 actual damages and $250,000 punitive damages.

_____

Foreman

Form No. 8

We find for the defendant on this claim.

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Foreman

D-3

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA

Civil Action File No. C 79-4087

HUGHES A. BAGLEY,
Plaintiff,
vs.
IOWA BEEF PROCESSORS, INC.,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Edward J. McManus United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged

That the Plaintiff, Hughes A. Bagley, recover of the defendant, Iowa Beef Processors, Inc., the sum of $8,750,000.00, with interest thereon at the rate of 8.75 per cent as provided by law, and his costs of action.

Dated at Cedar Rapids, Iowa , this 30 day of December, 1982.

Clerk of Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 79-4087

IN RE:

IBP CONFIDENTIAL BUSINESS DOCUMENTS LITIGATION

HUGHES A. BAGLEY,

Plaintiff,

vs.

IOWA BEEF PROCESSORS, INC.,

Defendant.

ORDER

This matter is before the court on plaintiff's resisted motion for sanctions, filed August 25, 1982, his resisted motion to alter or amend judgment, filed January 10, 1983, and defendant's resisted motion for judgment notwithstanding the verdict or alternatively for a new trial, filed January 10, 1983. Ruling in accordance with text of order.

This case was tried to the jury from December 13, 1982 through December 29, 1982. The jury returned its verdict in favor of plaintiff on December 30, 1982. Compensatory damages were set at $1,500,000; punitive damages were set at $7,250,000.

The first motion to be considered is plaintiff's motion for sanctions against defendant. In this motion, plaintiff complains that defendant was not prepared for a final pre-trial conference scheduled for July 22, 1982. Due to defendant's

lack of preparation, plaintiff claims his attorneys wasted both time and money in attending the conference.

Defendant argues that as of the date of the conference, there were a number of motions, some dispositive, that were still pending. In addition, defendant maintains that scheduling difficulties on both sides prevented the parties from completing a polished pre-trial order. Defendant argues that a combination of these and other factors prevented both sides from being fully prepared to assemble a final pre-trial order.

The court does not feel that in this case sanctions would be appropriate. First, as defendant noted, some difficulty existed in framing the issues and determining which witnesses would be listed since motions were pending before the court. Second, while it appears that at the final pre-trial conference defendant was not fully prepared, *both* defendant's and plaintiff's schedules precluded any productive meeting before the conference. The court finds this contributed significantly to the problem. Finally, in light of the verdict and the court's ruling below, the court concludes that imposition of sanctions would be unfair. Accordingly, plaintiff's motion is denied.

In his motion to alter or amend the judgment, plaintiff requests that the court allow an interest rate of 10% rather than the previously set rate of 8.75% and that the interest accrue from the date of commencement of plaintiff's action rather than the date of the entry of judgment.

Defendant vigorously resists the motion. Defendant argues that recovery of prejudgment interest on future damages is improper since the jury was instructed to compute those damages from the date of the verdict rather than from the date the complaint was filed. Defendant also argues that plaintiff should not receive prejudgment interest for damages he suffered after the filing of his lawsuit. Finally, defendant maintains plaintiff cannot recover prejudgment interest on the punitive damages award.

At the outset, the court notes that Iowa law governs the amount of interest due on the judgment. *Sedco International, S.A. v. Cory*, 683 F.2d 1201, 1212 (8th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 379 (1982).

The Iowa legislature, in response to delays in appeals, has provided a fixed interest rate of 10% per year on all judgments, to be computed from the date the petition (or complaint) was filed. *Janda v. Iowa Industrial Hydraulics, Inc.*, 326 NW2d 339, 344 (Iowa 1982); *Iowa Code* § 535.3 (1983).[1]

The court finds defendant's arguments to be without merit and that plaintiff should be allowed a rate of 10% per year, to accrue from the date of filing of the complaint. The language in the statute is straightforward and not of a precatory nature. The court refuses to frustrate legislative intent by ignoring its clear mandate.

In defendant's motion for judgment notwithstanding the verdict or alternatively for a new trial, the court has encountered difficulty in framing its ruling. Defendant's motion and memorandum merely sets out numerous propositions followed by lists of citations. Defendant submits no argument to the court identifying salient points or illustrating the application of cases to propositions. While brevity is a virtue the court admires, the court is not going to respond in detail to the fifty plus cursory points raised by defendant. Instead, the court will consider in depth those objections raised by defendant which have merit or those where substantial controversy exists.

The standard for ruling on a motion for judgment notwithstanding the verdict is whether the verdict of the jury is supported by substantial evidence. *See, Tackett v. Kidder*, 616

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[1] *Iowa Code* § 535.3 (1983) provides in pertinent part:

Interest on judgments and decrees. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year . . . The interest shall accrue from the date of the commencement of the action.

F.2d 1050, 1053 (8th Cir. 1980); *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433, 440 (8th Cir. 1978); *Duncan v. St. Louis-San Francisco Railway Co.*, 480 F.2d 79, 83 (8th Cir. 1973), cert. denied, 414 U.S. 859 (1973); *Marcoux v. Mid-States Livestock, Inc.*, 429 F.Supp. 155, 158 (N.D. Iowa 1977), *aff'd*, 572 F.2d 651 (8th Cir. 1978), cert. denied, 439 U.S. 801 (1978). The substantial evidence rule requires that the jury verdict be supported by more than a mere "scintilla" of evidence. *Singer*, 579 F.2d at 440; *Marcoux*, 429 F.Supp. at 158-59. In making this determination, the court must examine the record and review the testimony, but it may not assign credibility or weight to the witnesses and evidence. *Singer*, 579 F.2d at 441; *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967). *See also, Thieman v. Johnson*, 257 F.2d 129, 132 (8th Cir. 1958). The court may not substitute its judgment of the facts for that of the jury, and it must view the evidence in the light most favorable to the plaintiff. *Tennant v. Peoria & P.U. Railway Co.*, 321 U.S. 29, 35 (1944); *Russell v. United Parcel Service, Inc.*, 666 F.2d 1188, 1191 n.5 (8th Cir. 1981) (quoting Blackmun, J. in *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960)). As a result, motions for judgment notwithstanding the verdict are sparingly granted, and then "only where the evidence points *all one way* and is susceptible of *no* reasonable inferences sustaining the position of the nonmoving party." *Giordano v. Lee*, 434 F.2d 1227, 1231 (9th Cir. 1970), cert. denied, 403 U.S. 931 (1971) (emphasis is original). *Accord, Freeman v. Franzen*, 695 F.2d 485, 488 (7th Cir. 1982). *See, also*, 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.07(2) (2d ed. 1982).

In ruling on a motion for new trial, Rule 59 of the Federal Rules of Civil Procedure provides that a new trial may be granted in an action where there has been a jury trial for any of the reasons "for which new trials have heretofore been granted in actions at law in the courts of the United States." FRCP 59(a).

Motions for a new trial are independent from motions for judgment notwithstanding the verdict; they are governed by

different legal principles, and trial courts have greater latitude in ruling on them than they do in ruling on motions for judgment notwithstanding the verdict. *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 410 (8th Cir. 1976). Indeed, in considering such a motion, the trial court is governed by its sound discretion. E.g. *Bates v. Hensley*, 414 F.2d 1006 (1st Cir. 1969). As a general proposition, though, new trials are not granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Seven Provinces Ins. Co. Ltd. v. Commerce & Industry Ins. Co.*, 65 FRD 674, 688 (N.D. Mo. 1975); 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2308, at 32 (1973) (*Wright & Miller*). It is axiomatic that the burden of proving the propriety of a new trial rests squarely with the moving party. *Hansen v. Barrett*, 186 F.Supp. 527, 532 (D.Minn. 1960); 11 *Wright & Miller* § 2308 at 32.

As indicated in FRCP 59(a), there exists no precise or definitive list of grounds for a new trial. It is clear, however, that the court, as a prerequisite to granting a new trial on any ground, must satisfy itself that the error or defect in the earlier trial affected the "substantial rights" of defendant. FRCP 61; 11 *Wright & Miller* § 2305, at 41.

Generally, defendant argues that the jury verdict was entered in derogation of defendant's first amendment rights. Defendant points out that its letter to the Smith subcommittee was both absolutely and qualifiedly privileged. Defendant contends the letter was absolutely privileged since, one, the letter constituted testimony before Congress and, two, the letter was an exercise of its first amendment right to petition the government to influence legislation. Defendant argues that the letter was qualifiedly privileged as defendant had a right to reply to serious allegations made against it and that defendant also had a first amendment right to comment on limited public figures.[2]

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[2]The court notes that in this diversity action, Iowa law provides governing principles. *See generally, Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979).

In Iowa, the law provides that privileged communications fall into two categories: 1) those that are absolutely privileged, and (2) those that are conditionally or qualifiedly privileged. *Vojak v. Jensen*, 161 NW2d 100, 105 (Iowa 1968); *Mills v. Denny*, 245 Iowa 584, 63 NW2d 222, 224 (1954); *Fleagle v. Goddard*, 188 Iowa 1033, 177 NW 51, 52 (1920). *See also* 50 Am.Jur.2d *Libel and Slander* § 192 (1970).

The foundation upon which the doctrine of privileged communications rests is public policy. Upon the proper occasion, interests of society will dictate protection for a defamer from liability. It is at these times that the law favors the common welfare of the public over private individual rights. *Mills*, 63 NW2d at 224; *Fleagle*, 177 NW at 52 (quoting *Newell on Slander and Libel* §§ 492, 493). It is true, however, that the boundaries of an absolute privilege are narrowly drawn. 50 Am.Jur.2d *Libel and Slander* § 194 (1970).

In advancing its legislative testimony privilege, defendant relies upon § 590A of the Restatement (Second) of Torts:

> Witnesses in Legislative Proceedings
>
> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

In this case, defendant fails to bring itself under the protective umbrella of this privilege. The evidence shows that defendant never sent a representative to the Congressional subcommittee hearings to testify in person.[3] As a result, Congressman Smith did not place defendant's letter into the record. It is clear that defendant's actions took place away from the legislative proceeding in a non-testimonial

[3] In fact, in a letter dated June 29, 1979, Congressman Neal Smith invited Robert L. Peterson, IBP President, to appear under oath and testify before the subcommittee pursuant to committee procedure. This offer was refused and instead the letter was sent.

context. Given the strict application of absolute privileges, defendant's argument that the court should have adopted the § 590A privilege lacks merit.

Defendant next argues that the letter was absolutely privileged since it is entitled to exercise its first amendment right to petition the government to influence legislation under the *Noerr-Pennington* doctrine.[4]

The basis for defendant's claim of privilege originates with *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, defendant railroads conducted a publicity campaign designed to influence the passage of state laws detrimental to truckers. *Noerr*, 365 U.S. at 131. The truckers filed suit, alleging violations of the Sherman Act.[5] 365 U.S. at 129. The Supreme Court held there was not a violation of the Sherman Act since "no violations of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. Central to the Supreme Court's holding was the recognition of a citizen's right to petition the government. *See* 365 U.S. at 139.

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court reiterated its *Noerr* antitrust immunity position. There it was held, inter alia, that concerted efforts to influence public officials do not violate antitrust laws, even though elimination of competition is the desired effect. 381 U.S. at 670.

In *California Motor Transport Co, v. Trucking Unlimited*, 404 U.S. 508 (1972), the court held that the *Noerr-Pennington* doctrine also applies to groups petitioning administrative agencies (both legislative and executive). 404 U.S. at 510. The

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[4] *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[5] 15 USC § 1, *et seq.*

court concluded that the right to petition extends to all departments of the government. Id.

California Motor Transport Co. is significant, however, since it first confirmed the application of the so-called sham exception set out in *Noerr.*[6] *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 295 (8th Cir. 1978). In *California Motor Transport Co.*, the Supreme Court recognized that certain forms of illegal and reprehensible conduct may result in antitrust violations, 404 U.S. at 513, and that first amendment rights "may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." 404 U.S. at 515. This discussion makes clear that the essential element of the sham exception is the intent to injure a competitor directly through the lack of a genuine effort to influence government. *See, Mark Aero, Inc.*, 580 F.2d at 295.

The court does not agree with defendant that it should have an absolute privilege under the *Noerr-Pennington* doctrine for the Peterson letter. The court concludes that application of the doctrine would constitute an unwarranted extension of settled principles.

Examination of the evolution of the *Noerr-Pennington* doctrine and the applicability of it today illustrates the fact that its usage is normally confined to antitrust questions or those situations otherwise related to practices between competing business entities. *See* e.g. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking*

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[6] In *Noerr*, the Supreme Court recognized a sham exception to the privilege:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. at 144.

Unlimited, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, U.S. , 103 S.Ct. 814 (1983); *International Travel Arrangers, Inc., v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), cert. denied, 449 U.S. 1063 (1980); *State of Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); *Mark Aero, Inc., v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978). However, authority does exist which indicates that a claim of privilege under the *Noerr-Pennington* doctrine may be allowed in causes of actions other than antitrust. *See Havoco of America, Ltd., v. Hollobow*, 702 F.2d 643, 649-50 (7th Cir. 1983); *Suburban Restoration Co., Inc., v. Acmat Corporation*, 700 F.2d 98, 101 (2d Cir. 1983); *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F.Supp. 514, 524-25 (D.Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981); *Sierra Club v. Butz*, 349 F.Supp. 934, 938 (N.D. Cal. 1972).

The difficulty with defendant's position is that there are no cases, either cited by defendant or found by the court, which indicate that in an action for libel, the defendant may interpose a defense based upon the privilege set forth under the *Noerr-Pennington* doctrine. Defendant's attempted use of the privilege strays far from the context in which the privilege originated and the reasons behind the allowance of antitrust immunity. The court finds that, at the threshold, application would be inappropriate. *See generally, International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d at 1267 n.14.

Assuming arguendo, however, that the *Noerr-Pennington* doctrine applies to libel claims in this posture, the court finds that the action of the defendant fall within the sham exception. Defendant's actions were not motivated by a genuine desire to influence legislation, but rather by a desire to cause

plaintiff harm. This is not a case where two competing industries are engaged in a "no-holds-barred fight," having mustered all of their political and economic power in order to influence the legislative process. *See Noerr*, 365 U.S. at 144-45. Rather, here a large corporation is matched against a former employee. Defendant always had the opportunity to appear before the Congressional subcommittee and testify as plaintiff did. Rather, it chose to send a letter and caused it to be published which attacked plaintiff personally. The court cannot say it erred when application of the privilege was denied. Cf. *Westborough Mall, Inc. v. City of Cape Girardeau, Missouri*, 693 F.2d 733, 745-46 (8th Cir. 1982) (*Noerr* offers no protection where legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions).

In addition to the absolute privileges claimed above, defendant argues that the defamatory communication was qualifiedly or conditionally privileged as well. Defendant argues first that it had a right to reply to serious allegations made against it.

As a general proposition, declarations made in an honest endeavor to vindicate one's character or to protect one's interests are qualifiedly privileged even though they are false. 50 Am.Jur.2d *Libel and Slander* § 210 (1970). The defendant may publish, in an appropriate manner, anything which reasonably appears necessary to defend his own reputation. W. Prosser, *Law of Torts*, § 115 at 786 (4th ed. 1971) (Prosser). The Restatement (Second) of Torts characterizes the privilege in the following manner:

> Protection of the Publisher's Interest
>
> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

Restatement (Second) of Torts, § 594 (1977).

In the instant case, defendant failed to meet its burden in showing its entitlement to the privilege. Cf. *Brown v. First National Bank of Mason City*, 193 NW2d 547, 552 (Iowa 1972). The court determined that the occasion upon which the defendant published the letter did not give rise to a qualified privilege. *See* Restatement (Second) of Torts, § 619 (1977).

Central to the court's ruling in this regard is defendant's questionable good faith. In order to avail itself of the privilege, the dissemination of the defamatory statement must be done in an "appropriate manner." Prosser at 786. Here, defendant chose not to respond to plaintiff by testifying under oath subject to the subcommittee procedure. Instead, defendant submitted a written response which was published in part through the media generally for the public and in particular for those in the meat industry. It seems clear that the method of publication was such that most recipients of the defamatory matter were not in a position to render legitimate assistance to defendant. *See* Prosser at 787. In light of the circumstances surrounding the letter written and published by defendant, it would be unjust for defendant to avail itself of this qualified privilege.

Defendant's final request for a qualified privilege is based upon the constitution. Defendant maintains that it is qualifiedly privileged to comment upon public figures or limited public figures such as plaintiff.

The seminal case of *New York Times v. Sullivan*, 376 U.S. 254 (1964) held that the First and Fourteenth Amendments required that those who criticize public officials be afforded a qualified privilege to do so. *Sullivan*, 376 U.S. at 282-83. The Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.[7] *See also Brown v. Herald Co., Inc.*, 698 F.2d 949, 951 (8th Cir. 1983).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court extended the constitutional privilege enunciated in *Sullivan* to defamatory criticism of public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974). In the instant case, defendants argue that plaintiff was a limited public figure and that the letter was qualifiedly privileged since it constituted criticism of plaintiff.

In *Gertz v. Robert Welch, Inc.*, *supra*, the Supreme Court held that a media defendant that published defamatory material about an individual who was neither a public figure nor a public official could not claim a constitutional privilege for the injury caused by the statements. 418 U.S. at 332, 351-52.[8] In its opinion, the Supreme Court identified several important reasons for distinguishing among public and private plaintiffs. First, public officials and public figures usually

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[7] In an attempt to illustrate the meaning of this standard the Supreme Court has stated:

> [It is] clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[8] *See also Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 164 (1979).

have greater access to channels of effective communication and therefore may be able to counteract or rebut false or defamatory statements. Id. at 344. The court reasoned that close scrutiny must be accepted by public officials and public figures as a consequence of their involvement in public matters. Id. In addition, the media is entitled to assume that those individuals have voluntarily placed themselves in the public eye and the increased risk which follows from it. Id. at 345. However, with regard to private plaintiffs, the Supreme Court opined that they "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." Id.

Whether or not defendant in the instant case could have properly enjoyed a constitutional privilege turns on whether or not plaintiff could have been characterized as a limited public figure. The court holds that plaintiff was not.

In determining whether plaintiff was a limited public figure, the court utilizes a two-pronged analysis originally established under *Gertz*. First, a determination must be made that a public controversy exists. Second, the court must examine and measure the nature and extent of plaintiff's participation in the particular controversy. *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982). In this regard, the court focuses on whether plaintiff has placed himself at the forefront of the controversy in order to affect the resolution of the issues involved. *Gertz*, 418 U.S. at 345; *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 165 (1979).

Here, the court holds a public controversy existed. Many events occurred during the latter part of the 1970's which illustrated the nature of the controversy. In 1977, defendant sued plaintiff seeking, in part, injunctive relief. Defendant alleged plaintiff disseminated confidential documents. In 1979, plaintiff filed this action against defendant. During this period, congress conducted investigations into practices in the meat industry. In addition, the MPIA antitrust litiga-

tion continued. It is clear that the public had a clear interest in the unfolding events.

Having established the existence of a public controversy, the court looks to the nature of plaintiff's participation. The court finds that plaintiff did not voluntarily inject himself into the controversy. Plaintiff was teminated from defendant's employ in 1975. In 1977, it was defendant who sued plaintiff. In 1979, plaintiff's testimony before Congress, which precipitated the Peterson letter, was given pursuant to congressional subpoena. Following his testimony, plaintiff consciously avoided giving comment in the press. The court cannot say that plaintiff voluntarily thrust himself into the controversy.

Unlike defendant, who is the largest processor of meat in the world, plaintiff did not have access to channels of effective communication in order to refute or minimize defamatory statements. Although at times plaintiff had contact with the media, he did not possess "the regular and continuing access to the media that is one of the accoutrements of having become a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

Finally, although plaintiff's part in this saga is not insignificant, it cannot be said that plaintiff was the primary actor. This particular controversy involved a number of groups and persons, each with varying degrees of participation. Plaintiff was but one in a cast of many.

The court concludes, therefore, that since plaintiff cannot be characterized as a limited public figure, defendant is not able to claim a constitutional privilege to criticize. *See, Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1219 (6th Cir. 1982) (observing that Supreme Court has refused to extend actual malice requirement of *New York Times v. Sullivan* to plaintiffs who are neither public officials nor public figures).

Defendant's next argument concerns the submission of the court's instruction number nine to the jury. Specifically

defendant states that the instruction "unconstitutionally interjected a presumption of falsity of the alleged libel, shifted the burden of proof from plaintiff to IBP, and authorized a presumption of injury and damages."

In its instruction number nine, the court embodied in part, the Iowa common law of defamation. *See, Sheibley v. Ashton*, 130 Iowa 195, 106 NW 618, 619 (1906). The court retained the concept of libel per se, which naturally includes the attendant presumptions. *See, Vojak v. Jensen*, 161 NW2d 100, 104 (Iowa 1978).

It is the court's understanding that defendant seeks application of the *Gertz* standards in this case. The court declines to do so here, where there is a private plaintiff and a private defendant.

It seems clear that the scope of the *Gertz* standards protects only those defendants who are "publishers or broadcasters." *Gertz*, 418 U.S. at 341; *See* Note, *Iowa Libel Law and the First Amendment: Defamation Displaced*, 62 Iowa L.Rev. 1067, 1085-86 (1977). In actions between private individuals, the law of libel remains unchanged. Here, the court declines to alter or extend this result. *See* Id. at 1101.

Defendant's next substantive argument deals with duplicative damages. Defendant maintains that plaintiff was awarded damages under both the libel and false light theories for identical injuries resulting from the Peterson letter.[9]

Plaintiff argues that libel and invasion of privacy are recognized in Iowa as two separate causes of action. In plaintiff's view, since both causes of action seek to protect different interest, a recovery under each theory should not be considered duplicitous.

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[9] In this case, plaintiff was awarded $1,000,000 in actual and $5,000,000 in punitive damages under the libel claim and $250,000 in actual and $1,500,000 in punitive under the invasion of privacy claim.

At the outset, plaintiff is correct when he asserts that Iowa recognizes both torts and that they may be considered separate and distinct. *Anderson v. Low Rent Housing Commission of Muscatine*, 304 NW2d 239, 248 (Iowa), *cert. denied*, 454 U.S. 1086 (1981). In this regard it can be noted that Iowa has adopted the principles of the Restatement (Second) of Torts § 652A (1977). Id.

In examining the situation at hand, the court notes that in cases such as these, the theory of recovery is to award only that compensation which is fair and reasonable, and no more. 50 Am.Jur.2d *Libel and Slander* § 356 (1970).

In the instant case, the court agrees with defendant on this point and holds that where plaintiff recovers under theories of defamation and invasion of privacy for a *single occurence,*[10] then plaintiff has reaped a double recovery for the same wrong. 50 Am.Jur.2d *Libel and Slander* § 356 (1970). In the Restatement (Second) of Torts it is noted:

> The interest protected by this Section [§ 652E. Publicity Placing Person in False Light] is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, *although he can have but one recovery for a single instance of publicity.* (emphasis added).

Restatement (Second) of Torts § 652E comment b (1977). *See also, Team Central, Inc. v. Teamco. Inc.*, 271 NW2d, 925 (Iowa

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[10] It is uncontroverted that the libel and invasion of privacy are based upon a single incident, namely the publication of the Peterson letter.

1978) ("The purpose of damages is to restore an injured party to the position he enjoyed before his injury. Duplicate or overlapping damages are to be avoided."); Prosser at 814.

Accordingly, the court will grant defendant judgment notwithstanding the verdict on plaintiff's claim for invasion of privacy.

Defendant next argues that as a matter of law, it is not liable for intentional interference with plaintiff's future employment. Defendant maintains that plaintiff failed to show the existence of any employment opportunities which defendant interfered with. Defendant reasons that as a result, the jury's verdict could only have been a product of passion and prejudice.

Plaintiff rejects defendant's arguments and maintains that the claim of tortious interference with prospective contracts was properly submitted to the jury. Plaintiff points out that several of defendant's own witnesses, coupled with plaintiff's own testimony provides substantial evidence of the interference for the jury.

The tort of intentional interference with prospective relations was specifically recognized and adopted by the Iowa Supreme Court in *Clark v. Figge*, 181 NW2d 211, 214 (Iowa 1970). In the instant case, the court instructed the jury that the tort was comprised of the following elements: (1) that the plaintiff had prospective contractual relations with future employers; (2) that defendant knew of such relations and intentionally interfered with them; (3) that such acts caused future employers not to enter into or continue such relations; and (4) that as a proximate result of defendant's actions, plaintiff sustained damages. *See Stoller Fisheries, Inc. v. American Title Insurance Co.*, 258 NW2d 336, 340 (Iowa 1977); Restatement (Second) of Torts § 766B 1979).[11]

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[11] The Restatement (Second) sets forth the salient elements of the tort:

(footnote continued on next page)

The fighting issue here is whether or not plaintiff has sufficiently identified or articulated those prospective relations which were interfered with. In this case, plaintiff presented no evidence of defendant interfering with any *particular* prospective employer. Plaintiff only generally averred that defendant interfered with future employers and points to plaintiff's inability to find meaningful employment in the meat industry as evidence of defendant's tortious interference.[12]

The court holds that defendant should not be granted judgment notwithstanding the verdict. The expression, "prospective contractual relations" and other like terms, are not to be construed in a strict or technical sense. *See*, Restatement (Second) of Torts § 776B comment c (1979). It is neccary for plaintiff to specfically identify which prospective employer defendant tortiously interfered with, as the court does not consider that to be an element of the tort. *See*, *Crinkley v. Dow Jones & Co.*, 67 Ill. App. 869, 24 Ill. Dec. 573, 385 NE2d 714 (1978). Here, plaintiff showed that he was unable to procure employment in the meat industry following his difficulties with defendant. Given the relatively

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(footnote continued from preceding page)

Intentional Interference with Prospective Contratual Relation

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relations.

Restatment (second) of Torts § 776B (1979).

[12] The evidence shows, however, that plaintiff started work with Southwest Beef as President in June, 1981. That employment lasted only about six months, though, as the company experienced severe financial difficulties and ultimately ceased operations.

close-knit nature of the meat industry,[13] the court finds plaintiff's showing sufficient.

The final argument by defendant for the court's consideration deals with the damages awarded in this case. Substantively, defendant argues that the punitive damages awarded were outrageously large, and that the "total damages awarded bear no rational relationship to the alleged misconduct and injury."

At the outset, the court does not have any difficulty sustaining the actual damages awarded in this case. Given plaintiff's stature in the meat industry and defendant's actions, the compensatory awards are reasonable.

The more difficult question is whether the punitive damages are excessive.

As a general proposition the purpose of punitive damages is to punish the tortfeasor for his wrongful action and to deter him and others from similar future conduct. To accomplish this, the exemplary damages award must be relatively large. The award is not intended as compensation for the injured party. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Northrup v. Miles Homes, Inc. of Iowa*, 204 NW2d 850, 861 (Iowa 1973).

It is clear, though, that if the jury's verdict works a plain injustice or is monstrous, the court may exercise its discretion and set aside the award of punitive damages. *See* e.g., *Herrera v. Valentine*, 653 F.2d 1220, 1231 (8th Cir. 1981). However, the utmost respect must be accorded to the jury's resolution of the matters. The court is not to substitute its view for the view of the jurors. Jurors are particularly well suited for making this type of moral judgment so the court's intrusion should normally be reserved. *Pellowski v. Burke*, 686 F2d 631, 635 (8th Cir. 1982). *See also*, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982); *Hall v. Montgomery Ward & Co.*, 252 NW2d 421, 426 (Iowa 1977).

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[13] Testimony established the fact that officers of companies are rather flexible; that is, they move from company to company rather easily.

Here, although the award of punitive damages is large, the court cannot say that it "shocks" its conscience. The stockholders' equity in defendant is in excess of 290 million dollars. Defendant had sales of over 4 billion dollars. In short, as noted earlier, defendant is the world's largest meat processor. As such, the court cannot say that $5,750,000 in punitive damages is excessive or outrageous.

It is therefore

ORDERED

1. Motion for sanctions denied.

2. Motion to alter or amend judgment granted.

3. Motion for judgment notwithstanding the verdict or alternatively for a new trial granted in part, denied in part.[14]

June 24, 1983

EDWARD J. MCMANUS

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

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[14] For purposes of clarification, the verdict and judgment should now reflect the following damages:

a) Libel
$1,000,000 actual
$5,000,000 punitive

b) Intentional Interference with Contract
$ 150,000 actual
$ 500,000 punitive

c) Intentional Interference with Prospective Contracts
$ 100,000 actual
$ 250,000 punitive

$7,000,000 Total

APPENDIX F

Response of

Iowa Beef Processors, Inc.

to

Congressman Neal Smith
Chairman, Subcommittee on SBA
and SBIC Authority and General
Small Business Problems

August 1, 1979

Index and Summary

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Introduction: IBP declines Smith's invitation to testify in his Small Business Subcommittee's hearings on the meat industry because of his demonstrable prejudice and obvious ulterior motives to aid a friend and political crony in antitrust treble damage litigation and grab headlines. However, IBP submits a detailed rebuttal to the false accusations and innuendos of witnesses hand-picked by Smith for their obvious biases. F-5

Yellow Sheet: Smith's hearings on the role of the Yellow Sheet in meat marketing produced no evidence that would support accusations of manipulation which have been more objectively and carefully investigated and rejected by other responsible bodies — the U.S. Department of Agriculture, its Beef Task Force, the Antitrust Division of the Department of Justice, and the 300,000 member National Cattlemen's Association. F-10

West Coast Packers: A representative of the Western States Meat Packers Association, many of whose members have recently been convicted of price-fixing in the Southern California area or indicted (and awaiting trial) for price-fixing in the Pacific Northwest, complained that IBP's 1977 entry into the West Coast Market would result in a monopoly and drive local packers out of business; but fell flat when pressed by Congressman Marriott for specifics. F-12

Colorado Packers: Similarly, representatives of the Colorado Meat Dealers Association raised the spectre of members going out of business for lack of sufficient cattle if IBP builds a new, modern beef slaughtering and processing plant in Southeast Colorado or Western Kansas; but their economic projections are based on spurious data and assumptions and the Colorado legislature and Governor and both Kansas senators, Representative Sebelius and the Kansas Livestock Feeders Association have enthusiastically welcomed IBP's proposal to build a new plant. Again, the motive of entrenched packers to

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preclude new competition was affirmed by their representatives' Freudian slip: They are not afraid of competition unless it affects their area..... F-13

Northwest Packers: A cursory and misleading telephone survey by Smith's staff of packers in the Pacific Northwest (the largest–except IBP–being under indictment or accused by the Justice Department of conspiring to fix prices) did not support Smith's conclusion that IBP's entry into the market and joint venture with several feedlots are causing severe problems. Rather, it confirms Secretary Berglund's testimony and the findings of the District Court in Boise that the Northwest cattle and beef industries have improved, competitively, since IBP's entry..... F-15

The Williams Report: The conclusions of the report on the structure of the beef industry prepared by Doc Williams, a paid consultant to Smith's Subcommittee, are not "alarming" and in fact differ markedly from a tentative draft leaked to the media by Smith with a press release derogatory to IBP. Williams' report is compendium of statistics that merely proves what everyone in the industry knows: The location of cattle feeding has shifted and packing plants are following the shift. In fact, Williams' predicts that there will be more–rather than less–competition in the future among larger packers like IBP..... F-19

Hughes Bagley: Smith has furnished a forum for a disgruntled ex-IBP employee to continue his vendetta against IBP. Both while he was at IBP and subsequently, Bagley has stolen IBP documents and misused IBP confidential information to defame and cause problems for IBP. Now, he has made accusations of certain unlawful or questionable conduct, which IBP is rebutting in detail. At best, the incidents Bagley discusses are ancient history and scandal sheet gossip. At worst, they are

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malicious–even perjurious–attacks on IBP and its customers. IBP has never cheated any customer or granted unlawful preferential discounts to any customer. Indeed, as Bagley himself was forced to admit under questioning by Congressmen Richmond and Evans, IBP has the best product integrity in the industry and should be praised for its efficiency and commitment to boxed beef which has revolutionized the industry, to the benefit of producers and consumers alike. In the end, Bagley's accusations boiled down to a feeling that it is "possible" that IBP had been "a little overzealous" in pursuing its commitment..... F-23

Conclusion: It is perverse that the Chairman of a committee concerned with Small Business should fail to appreciate that IBP is a prime example of a small business (founded less than 20 years ago with an SBA loan) which has made good. Instead, the Chairman has chosen to manipulate his hearings to pursue a private vendetta against IBP for the ulterior motives of press coverage and assistance to a friend in pursuing antitrust litigation..... F-42

August 1, 1979

Congressman Neal Smith
Chairman, Subcommittee on
SBA and SBIC Authority and
General Small Business Problems
2361 Rayburn Office Bldg.
Washington, DC 20515

Dear Mr. Smith:

You have invited this Company to supply a witness to appear and testify before your Subcommittee on General Small Business Problems. We have faithfully followed a policy over the years of full cooperation with governmental inquiries concerning IBP or the beef industry and, indeed, even offered to cooperate with you — an offer that was rejected with disdain. We have done so because we believe that all we have done is in the best tradition of the American free enterprise system and because we support government's responsibility to see that enterprise remains free and that freedom is not abused. We could not have grown as we have without customer acceptance, a superior product and value, and adherence to the laws of this country.

Your investigation, and invitation to appear, present us with a unique situation. Until now we have found that most governmental agencies have had a sincere interest in our industry and a desire to obtain all pertinent facts and opinions in a fair, unbiased manner before leaping to legislative conclusions. However, we have followed the course of your hearings and have reached the tragic but inescapable conclusions that: (1) you do not appear to desire all of the relevant information and educated opinion on the subjects you claim to be investigating; (2) you have only superficial interest in fairness and only minimal regard for constitutional rights of due process or judicial procedures; and (3) you bear an obvious prejudice against this Company and have gone to some lengths to publicly defame us on numerous occasions.

Your attitude initially puzzled us, but gradually the motivations behind your investigation have become clear. Quite frankly, we are appalled by them.

We have long known of your close friendship with and political ties to Lex Hawkins, who is the lead attorney representing the so-called Meat Price Investigators Association ("MPIA"), a small fringe group of farmer-feeders formed to pursue treble damage antitrust litigation against most of the principal supermarket chains and also against IBP and three other "new breed" beef packers who have successfully resisted unreasonable union demands that have crippled other packers and, by admissions before your own committee, made them non-competitive in their cost structure. We also know that Mr. Hawkins prepared your former special counsel, Donald O'Brien, for your initial hearings and that your investigator, Nick Wultich, copied Hawkins' deceptive and unfair approach in his so-called "analysis" of the Yellow Sheet's reporters' work sheets that Mr. Hawkins had previously used in deposing Lester Norton, the National Provisioner's president, in the antitrust litigation. You also invited testimony containing derogatory innuendoes about IBP from James Cothern, who appeared under the guise of an impartial academic economist, without disclosing that he was in fact a paid consultant to Mr. Hawkins in the antitrust case.

You have also now used the fruit of Mr. Hawkins' unethical clandestine meetings with Hughes A. Bagley, a disgruntled former IBP officer who stole thousands of confidential IBP documents when he left IBP in July, 1975.* Mr.

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*Included were such things as weekly profit and loss statements, monthly reports on production and sales, customer lists, monthly president's staff reports, budget materials, production reports on

(footnote continued on next page)

Hawkins arranged these meetings at a time when Bagley was a high-level executive of Spencer Foods, Inc., another defendant in the antitrust case, but without first obtaining the consent of or even notifying Spencer or its counsel — conduct which was unethical, as the federal Court of Appeals for the Eighth Circuit has found.

Although Mr. Hawkins had thus obtained copies of Bagley's IBP documents, he could not freely give them to you because two federal courts had issued protective orders precluding the disclosure of those documents to persons not involved in the litigation between Hawkins and MPIA and IBP.

However, you did not let these court orders stop you. Following a suggestion by Mr. Hawkins' client (MPIA's Chairman), you first subpoenaed the documents from Hawkins, who then moved in the antitrust case for leave to comply notwithstanding the protective order. But Judge William Taylor in Dallas instead found your attempt to "run roughshod" over his order a violation of IBP's due process rights. Your appeal from that decision was thrown out by the court of appeals because you had never obtained the necessary authorization from the House of Representatives to conduct litigation in pursuit of the documents.

You then subpoenaed the documents from Bagley, who moved for an order from the court presiding over IBP's action against Bagley, Hawkins and others allowing him to turn over the documents without violating the Court protective order. The District Court erroneously granted Bagley's motion, but before IBP even learned of the decision and

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(footnote continued from preceding page)

yields and other highly proprietary data — hardly Bagley's personal papers.

could start the appellate process which ultimately led to its reversal, your investigator seized the documents from Bagley's lawyer. You thereafter refused to submit to the jurisdiction of the court of appeals hearing that matter, and your counsel, Mr. Fitzgibbons, bragged that the documents were now in your "ballpark," where legal rules do not apply.

You have thus throughout your hearings followed the strategy charted by Mr. Hawkins, and we are forced to conclude that your chief goal is to be of assistance to your friend and political associate in his trebel damage actions. We have considered the possibility that you have acted in good faith and that Mr. Hawkins has simply misled you. But we have had to reject that possibility because you have obviously chosen only those witnesses bearing particular grudes against IBP or who fear new competition and are attempting to forestall IBP entry into their protected markets. This roster of witnesses in itself rules out a bona fide effort on your part to study the meat industry.

In addition, although your hearings were originally billed as exploratory of "impediments to meat marketing," you have studiously avoided the greatest impediment of all — namely, the illegal prohibition against handling prefabricated boxed beef imposed by the Amalgamated Meat Cutters & Butcher Workmen's Union on retailers in important metropolitan areas. We note that Mr. Hawkins' former law firm has represented that Union for many years and that Mr. Hawkins personally has represented a high official of that union. Similarly, your former special counsel who initiated these hearings represented union members or sympathizers who were convicted of dynamiting IBP property (or the homes and cars of non-striking workers) during a violent strike against IBP in 1969-1970. As a result of that strike,

IBP was awarded a multi-million federal court judgment against the Union for damages sustained by IBP.

Finally, we also believe that you are attempting to make political capital out of an anti-IBP crusade. There are undoubtedly some people in Iowa associated with the Amalgamated Meat Cutters Union and the Meat Price Investigators Association represented by Mr. Hawkins who will be pleased by your attacks on us, and given IBP's importance to the State's economy and the controversies surrounding the Union's strikes, the local media understandably are willing to give you all the attention you seek.

Because of your plain prejudice against us and your unwillingness in the past to abide by due process and the rule of law, we are initially inclined simply to reject your invitation and, when appropriate, tell our story in the courts or before congressional committees having jurisdiction over the meat industry where we would be fairly treated. But your attacks upon us and the distortions of the truth occurring in your hearings have reached such an extreme that we owe those persons who deal with us on a day-to-day basis and whose trust we have earned over the years a specific rebuttal of the accusations that have been made in your hearings and published by the press. Therefore, while we reject your invitation to appear at your hearings, we submit the following statement to show that our unwillingness to appear results not from an inability to refute the charges made against us, but instead from our firm conviction that we would not be provided a fair forum and would be used as simply another opportunity on your part to grab headlines by anti-IBP accusations. Accordingly, we ask that this letter be made part of the official proceedings of your Subcommittee.

We realize that our rebuttal will not have the least impact on you or on your continuing attacks on this Company, but we hope that the open-minded members of your Subcommittee, the media, the cattle and beef industry, and the public who may read it will begin to question and not uncritically accept what you are saying.

Yellow Sheet

You began your meat industry hearings in the fall of 1977 by focusing on your suspicions of "manipulation" of the Yellow Sheet reporting of beef prices. At that time, Mr. Hawkins had on file antitrust complaints against the supermarkets and packers, including IBP, also alleging manipulation of the Yellow Sheet.

Your hearings were anything but an objective examination of the Yellow Sheet and beef price reporting; instead you were plainly an advocate for a particular viewpoint, called an overwhelming number of witnesses known to support that viewpoint, and ignored all contrary testimony and evidence. As indicated above, your strategy was identical to that of Mr. Hawkins, who in fact prepared your Subcommittee counsel for the hearings; Mr. Hawkins' retained economic expert, James Cothern, was one of your main witnesses but failed to disclose his connection to Mr. Hawkins and thus his obvious motivation to support litigation positions taken by Mr. Hawkins; and your staff investigator used precisely the same misleading technique of analyzing the Yellow Sheet reporters' work papers that Mr. Hawkins used in deposing Mr. Lester Norton, President of the National Provisioner which publishes the Yellow Sheet.

Despite your efforts to skew the record against the Yellow Sheet, your hearings disclosed no evidence of manipulation of the Yellow Sheet's reports of beef prices. However, that

did not prevent you from concluding in your Report that "there is a *possibility* of meat packers and others reporting sham sales to reporting services in order to manipulate the prices reported" and that "the free market system has deteriorated and is close to being eliminated entirely." (Underscoring supplied.)

Other more responsible bodies without a particular axe to grind have completely rejected your conclusion. The USDA has made its own in-depth study of beef price reporting and went well beyond the faulty methods used in your investigation by examining packers' sales documents to determine whether the Yellow Sheet accurately reflected actual sales prices. It concluded that the Yellow Sheet did fairly report the market and was not manipulated. That conclusion has recently been fully endorsed by the 300,000 member National Cattlemen's Association, which specifically rejected your views. Likewise, the Antitrust Division of the Department of Justice investigated the Yellow Sheet's price reporting and found no evidence to support accusations of conspiratorial manipulation.

As we told the USDA's Beef Task Force, which also rejected your views, we are by no means irrevocably committed to the present systems of beef price reporting, although we do believe that they have performed a valuable service to the entire industry. We will gladly participate in any objective efforts to devise new and better methods. However, we deplore your unjustified attack on the integrity of the Yellow Sheet and those who report to it and your willingness to allow your Subcommittee to be used for private litigation purposes.

West Coast Packers

Your first efforts to attack IBP directly began with your full endorsement of the testimony of Edwin R. O'Neill, a leader of the Western States Meat Packers Association, who complained that efforts by IBP to enter the West Coast beef market would result in IBP monopoly power which would drive many local packers out of business. He also claimed that large boxed beef companies including IBP benefited from "substandard" wage rates paid their employees.* You readily accepted the truth of the accusations without apparent concern that numerous members of the Western States Meat Packers Association have recently been convicted in federal court of price fixing and are clearly trying to protect themselves from the rigors of free price competition with IBP. Other congressional members of your Subcommittee, however, plainly knew the score, although their comments appear to have been ignored by the press. For example, Congressman Marriott commented as follows after listening to O'Neill's testimony:

> "I am in favor of the interests of small businesses, but some small businesses grow to be big because they are efficient, because they capture a market, because they are able to serve a need.
>
> "I am just wondering if we have this kind of situation and whether Iowa Beef is really as big a culprit as we are saying they are."

* * * *

*In fact, a recent wage survey by the Pacific Coast Meat Association showed that the IBP plants surveyed averaged 60¢/hour *more* than the non-IBP plants surveyed — and your majority staff was well aware of that fact.

> "I am trying to take your position, but I am having a difficult time getting any meaningful facts to indicate that we have a problem other than one company in the business has out-maneuvered the rest of you and are making some money and selling beef at a lower price, and then we are all scrapping around worrying about how to contain them."
>
> "I am not sure containing them is the way the free enterprise system ought to work."

Given these concerns, Congressman Marriott asked O'Neill point-blank whether he had evidence that large packers were violating the antitrust laws, and O'Neill, despite the accusations of his prepared statement, conceded:

> "I have no idea. It is something I do not think, that one sitting where I am sitting and being rather removed could see these things. But I think it should be looked into, and there is no way that I could make a conclusion on that."

Colorado Packers

Your next witnesses — representatives of the Colorado Meat Dealers Association — made even more sensational charges against IBP and submitted supposed statistical evidence that an IBP plant in their area would drive smaller packers there out of business by depriving them of the supply of cattle they needed to continue operations. They specifically referred to IBP's purported "national monopoly power," "predatory" pricing, and "improper means" of gaining market "dominance." However, their economists' conclusions upon which these Colorado packers based their dire predictions of the consequences of an IBP plant in Colorado are entirely specious.

The Colorado economists' basic premise is that an IBP plant in their State with a slaughter capacity of 1.2 million head per year would take all the cattle needed by present Colorado packers who are not integrated with cattle feeding (as are some Colorado packers) and thus do not have "captive" cattle supplies. To reach this conclusion, they grossly inflated the number of steers and heifers slaughtered by these non-integrated packers, ignored the significant increase in the number of steers and heifers currently on feed in Colorado feedlots and the unused capacity of existing feedlot facilities, and assumed that IBP would begin maximum production in Colorado immediately. In fact, IBP would gradually phase in its production, which in any event would not even commence for another two years, a period in which feeders would surely adjust to the future increased demand for cattle. The economists thus refused to consider the obvious stimulus to cattle feeding from a new large plant in the region.

These various economic fallacies completely undermine the Colorado packers' assertions that they will be unable to co-exist with an IBP plant in Colorado.* Quite to the contrary, there will be sufficient cattle supplies for all who wish to compete for them. Moreover, the cattle feeders in Colorado and western Kansas would undoubtedly prosper, which is why they, as well as the Colorado legislature and Governor and the two Kansas senators and Representative Sebelius

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*The Colorado Meat Dealers also failed to offer any hard evidence corroborating their broad assertion that they are as efficent as IBP. They also claimed that IBP's purchase of carcasses from other packers equal 15% of Federally Inspected Slaughter. In fact, we have never purchased from other packers more than 1.5% of the annual FI Slaughter.

have all ardently supported IBP's proposed new plant. Obviously, like the West Coast packers, these Colorado packers would prefer their present cozy relationship and dread spirited and open competition from IBP, as indicated by the following Freudian slip by their spokesman (Spivak) to Congressman Smith:

> "We are not afraid of competition, let us be clear about that. We are afraid of competition when it begins to affect our area."

Northwest Packers

You continued your attempt to expose the supposed IBP threat to smaller packers by entry into new regional markets by "investigating" the Pacific Northwest — not through the testimony of other packers in that region, but rather through a cursory telephone survey of the packers by John Helmuth, your staff economist. The respondents to the survey questions were unidentified, and Mr. Helmuth admitted that "[s]ince this was a telephone enumeration, the questions were necessarily general, and detailed responses could not be garnered within reasonable time restraints."

The answers to Helmuth's telephone questions were as useless as his survey technique: 35 of the 43 packers described the "current economic health of the beef packing industry in [their] area" as "unhealthy;" but only 30 reported that their 1979 "margins" were worse than 1978's. The term "margins" was not defined by Helmuth and it was left to the individual packer to interpret; but apparently Helmuth thought it meant percentage of profit per head sold. If so, the same dollar per head profit would enable a packer anxious to complain about IBP's entry into the market (and purposely not pressed by Helmuth for specifics) to report "worse" margins in 1979 simply because the price of beef had

risen dramatically between 1978 and the Spring of 1979. Also, since 1978 was apparently a record profit year for many Northwest packers, it would not be at all surprising (or significant) if early 1979 margins were not as good. Significantly, your own staff report indicates that the primary reasons for lower margins are tight cattle supplies because of the low phase of the cattle cycle (a nationwide phenomenon), consumer resistance, and new competition from IBP's boxed beef (certainly a desirable result in an area previously characterized by a shortage of locally produced beef and, according to the Justice Department, price stabilizing arrangements among the local packers).

Even more revealing than the answers to Helmuth's vague "economic health" and "margins" questions are the answers to his questions concerning "any problems you may be having" procuring cattle or selling product. Despite the general cattle shortage experienced by all packers (including IBP) only 9 of the 43 surveyed packers reported "severe problems" in cattle procurement and only 10 reported "severe problems" in selling product. Moreover, your own staff report indicates that is is the large packers who are the biggest complainers and they are the ones who have had their own totally-captive cattle supplies for years and have been indicted (or named as co-conspirators) for price-fixing. The moderately sized and smaller packers reported that they are able to make a profit for various reasons, which shows that they are adapting to the new competitive situation in the Northwest. Their biggest specific complaint seemed to be "harassment by USDA because of the bonding requirements they face." You may not know it, but while generally supporting the concept of packer bonding (e.g., IBP voluntarily bonded itself years before the law required it), IBP warned USDA against excessive bonding requirements precisely

because we felt they would unfairly burden smaller packers and endanger the structure of the industry, which necessarily includes smaller packers who can perform functions which IBP and the larger packers cannot perform as well.

The bottom line question Helmuth asked was whether the surveyed packers expected to be out of the cattle slaughtering business within the next year, and only 2 said "yes" — not a surprising number considering that your own report shows an average of more than 3 packers a year went out of business in the 10 years *before* IBP ever came to the Northwest.

The significance of one general comment made by the surveyed packers was completely lost on you and Mr. Helmuth: Several packers reported that they could purchase carcasses from other packers as far away as Texas cheaper than they could slaughter them themselves. Since the difference in the live cattle market in the 2 areas cannot account for this phenomenon, this is an admission that inefficiency and excessive kill costs make those packers non-competitive with Texas packers by more than the freight from Texas. And yet you and your staff seem willing to ignore entirely the subject of comparative packer costs and efficiencies. Indeed, you repeatedly have expressed concern for the welfare of packers who are every bit as efficient as IBP — and yet you have made no effort whatsoever to force complaining packers to produce evidence that they are in fact operating efficiently and deserve your sympathy.

Despite the patently unscientific and hurried nature of the Helmuth survey and the absence of any verifying evidence, you were quite willing to conclude that the situation in the Northwest resulting from IBP's joint venture with several feeders was "unhealthy" and "anticompetitive" even though

an extensive trial of those very issues in federal court in Boise and the Department of Agriculture itself reached the completely opposite conclusion.

As you know, the USDA filed an administrative complaint and a preliminary injunction application to preclude the members of the North West Feeders cooperative from marketing their cattle through IBP under a 50-50 profit-sharing arrangement — exactly the kind of arrangement which the USDA's Farmer Cooperative Service had been urging cattlemen to pursue as a way to increase their share of the profit from the sale of their livestock. As you also know, in June, 1978, District Judge Fred Taylor in Boise threw the preliminary injunction request out of court, saying that the USDA had been poorly advised to bring the case because the joint venture made good business sense and the new IBP plants (which it made possible) would be an asset to the area. Subsequently, in January, 1979, the USDA voluntarily dismissed the administrative complaint as not being in the "public interest."

Furthermore, Secretary of Agriculture Bergland opened your current round of hearings on May 1, 1979 by telling you that after the USDA's complaint was filed:

> "economic conditions in the cattle feeding and packing industry improved appreciably. The number of cattle on feed increased greatly; packers competing with Columbia Foods [IBP's subsidiary] operated profitably, many increasing their slaughter and at least one showing record profits; and feedlot and cow-calf operators experienced improved markets.
>
> "The anticipated adverse economic effects of the joint venture did not occur."

You were also specifically assured at that opening hearing by Charles Jennings, Deputy Administrator of the Agricultural Marketing Service for Packers and Stockyards, that the USDA had sufficient resources to monitor the joint ventures and would know in a short period of time of any anti-competitive practices. The USDS has *not* found any such practices in the Northwest and there are none. Rather, there is just good old-fashioned competition by the first successful new entrant in the Northwest packing industry in many years.

Thus, your initial efforts were devoted entirely to bringing forth and endorsing the views of particular packers who oppose new competition and want to insulate their regions from the stimulus provided by energetic, innovative packers based elsewhere. It is just such insulation which allows anticompetitive practices and arrangements to breed and thrive. Despite the extensive and uncritical coverage the press gave to the complaints of these special, vested interests, we trust that every reasonable, fair-minded person will immediately see them for what they really are: Last ditch attempts by entrenched packers to avoid exposing their inefficiencies to the acid test of open competition.

The Williams Report

Your next step was to add the superficial veneer of academic respectability to your accusations by presenting with much ballyhoo a study by Prof. Willard F. Williams, a paid consultant to your Subcommittee, entitled "The Changing Structure of the Beef Packing Industry." Williams himself called his report "sort of a rush job." You, however, labeled this report a "landmark" and its result "alarming," although it is hardly that. What is alarming is the manner

in which you distorted the Williams report in your press release to obtain sensational headlines.

The week before the Williams report was to be formally submitted to your Subcommittee, you leaked to the press a copy stamped "Tentative Final Draft *Not For Release or Publication,*" accompanied by a press release based upon the tentative draft, to be published on the day the report was formally submitted. Despite the tentative draft's significant differences from the final version Prof. Williams actually gave you, the press accounts of his report were based on the tentative draft and your press release and you never informed the media of the discrepancies.

The tentative draft and your press release referred directly to IBP as "predatory," stated that IBP may have been indirectly responsible for American Beef's bankruptcy, and claimed that "structural chaos" was occurring in the Northwest because of IBP's entry. *None of these advance press release allegations appeared in the final version of Prof. Williams's report.* Indeed, in his oral testimony before your subcommittee, Prof. Williams specifically conceded that he knew of no evidence of predatory conduct by IBP and thought American Beef failed because it over-extended itself in attempting to keep up with its competitors. In his final report, the reference to "structural chaos" in the Northwest was diluted to a statement of the obvious — that there were "noticeable structural rearrangements" taking place. The public was never told of Williams' final conclusions, and was, therefore, left only with your characterizations of his preliminary draft.

Except for some obvious factual errors and faulty economics analysis,* the Williams report itself is nothing more than an innocuous compilation of statistics that show what everyone in the beef industry already knows — that the structure and location of the cattle feeding industry has changed and that the most dynamic packers have changed with it by building larger, more efficient plants where the cattle are located in order to avoid wasteful transportation and shrink. It is a story which has been repeated in American business a thousand times over when we saw the appearance of the automobile, the electronic computer, hybrid seeds, etc. While Prof. Williams apparently has a nostalgic preference for plants that kill only 100,000-150,000 head per year, the USDA has recently warned farmer cooperatives interested in entering the meat packing business that today's technology and economics dictate an optimum kill capacity of at least 375,000 head — the kind of plant that IBP and its modern competitors have been building.

Despite your conclusion that the results of the Williams Report are "alarming," an objective reader (accepting its statistical projections of the number of firms and plants that will be in existence in 1995, although the assumptions upon which they are based are inadequately explained and justified) can only be *reassured* by its indication of the degree of competition that will persist throughout the remainder of this century. Prof. Williams predicts that there will be 572 packers in 1995 compared to 638 in 1977, and those packers will have 659 slaughtering plants compared to 711 in 1977.

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*Both Prof. Williams and you, for instance, misunderstand the 1970 IBP consent decree. You both stress that it prevented any expansion by IBP in the 4-state area through 1980. In fact, it merely blocked IBP acquisition of existing plants; we have been completely free to build new plants in the area.

Moreover, most of the changes would occur among the smallest packers killing 0-9,999 head a year (less than 200 head per week), and competition among the largest firms will significantly *increase*: Prof. Williams projects 41 firms killing more than 200,000 head a year in 1995, whereas there were only 25 such firms in 1977. Indeed, the number of firms killing more than 1 million head annually — plainly those that would compete most efficiently with IBP — will nearly *triple* from 5 to 13.

The only thing smacking of sensationalism in the final version of the Williams Report was its construction of a scenario about IBP potentially forcing cattle prices up and boxed beef prices down to apply a cost-price margin squeeze to its competitors. However, Prof. Williams took great pains in both the report itself and in his later oral testimony to describe the scenario as a completely hypothetical situation which in fact had *not* occurred.*

Moreover, while Prof. Williams purports to be knowledgeable about the cattle industry, he further admitted that his hypothetical was borrowed from a study by economist Peter Max of National Economic Research Associates ("NERA"). Although Mr. Max had no previous experience in the cattle or beef industries, the USDA spent $17,500 of the taxpayers' money to have him do a two-week study in September, 1977 to see if there was a viable economic basis for filing a complaint against IBP either because of its fast growth or because of its joint venture with the North West Feeders'

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*Since this hypothetical scenario was not in the tentative draft of the report, someone obviously made the last-minute decision that draft references on predatory conduct by IBP were unsupportable and then strove to get as much mileage as possible out of hypothetical conduct.

cooperative. Only after concluding that (1) "little, if any, of the data suggests a monopoly position for IBP and much of the data does not point to undue concentration" in the beef industry and (2) that "there is little current indication of known conduct by IBP which inherently is anticompetitive," did Mr. Max invent his price-squeeze hypothetical.

The USDA then hired another outside consultant, Mr. Mund, to provide a critical appraisal of the NERA report and he, apparently, convinced USDA that the Max hypothetical was too far-fetched to pursue. Now we find the same price-squeeze hypothetical regurgitated by Williams, but only after he expressly disavows having any study of the conduct of IBP or other beef packers and therefore takes no personal responsibility for the hypothetical, and after admitting that he personally believes that IBP and the beef packing industry in general are efficient and highly competitive.

Without your leaking of the rejected tentative draft of the report and your press release based upon it, the Williams Report would hardly have triggered the extensive press coverage you did obtain with your unsupportable — and therefore defamatory — statements about IBP predatory conduct. The Williams testimony is therefore another example of your predisposition toward castigating IBP, regardless of the facts supplied even by your own paid witnesses.

Hughes Bagley

You subpoenaed Bagley, who had been IBP's Vice-President for Retail Sales, from 1971 until terminated in 1975, and is now an officer of a competitor, Dubuque Packing Co. When he left IBP, he stole 7 boxes of IBP documents, many of a confidential business and legal nature. Later he obtained additional confidential IBP documents generated after his departure from two other former IBP employees. Despite the

fact that two courts have ruled that these confidential IBP documents are entitled to protection from public disclosure, you felt free to release many of them at your hearings without affording IBP any opportunity to assert its constitutional right to the privacy of its business and legal affairs.

The thrust of Bagley's testimony was that he believed he should stand up and be counted because he was concerned that IBP had become "overly zealous in its attempts to control and monopolize the packing industry." (At one point, you goaded Bagley into the ridiculous suggestion that there was also some danger that IBP would take over the entire U.S. food retailing industry.) Ambitions to lessen the influence of the old line packers and bring IBP into a dominant position in the packing industry, as well as to dilute the historical dominant bargaining position of the large supermarket chains, are attributed to IBP's former Co-Chairman, C. J. Holman, who died in February, 1977, and Bagley does not purport to have any knowledge of IBP's present management's goals.

To support his accusation that IBP was out to take over the packing industry, Bagley cites several things he thought may have been illegal, although he repeatedly disclaims having any legal knowledge and denies that he is accusing IBP of anything illegal.

First, Bagley is concerned that because IBP has succeeded in becoming the most efficient, low-cost producer in the industry, it can pay its suppliers more for their cattle and thereby "deprive" competing packers of their raw material. While IBP does try to pass some of its cost savings back to the cattle feeders who are, after all, the life blood of the industry, there is no way that IBP has or could corner the live cattle supply. For example, IBP's fiscal 1978 slaughter (its

highest ever) was 4,351,512 head, which was only 11% of the nation's commercial slaughter of 39,552,100 head.

Next, Bagley is concerned that IBP's purchase from competitors of carcasses for boxed beef fabrication might make them captive suppliers and enhance IBP's market position. However, he conceded under questioning by Congressman Richmond that there were valid business reasons for purchasing carcasses and that his own company both buys from and sells carcasses to IBP. In fact, IBP has purchased carcasses only when necessary because not all of its own slaughter meets IBP's processing specifications, which Bagley praised, or when appropriate to achieve purchasing or transportation economies. For example, in fiscal 1978, IBP purchased 459,895 carcasses which comprised only 13% of its total boxed beef carcass equivalent sales and 1% of commercial slaughter.* As for the captive supplier idea, we know of no complaint to that effect from anyone who has sold carcasses to IBP (including Bagley's company) and believe that suppliers are pleased to have a reliable market outlet for a portion of their production, with prompt payment and minimum credit risk. Indeed, if you had bothered to ask them, you would have found that many smaller packers without the capital or facilities for large scale boxed beef production welcome the change to fulfill a useful economic function in the modern beef industry which, as even your hand-picked witnesses again-and-again testified, is inevitably drawn to the economies, efficiencies and sanitation of boxed beef.

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*At one point Bagley indicated that IBP purchased 15,000 carcasses per week, which would be 780,000 per year. This has never happened.

Finally, Bagley's scenario calls for IBP to move into "portion control" beef and then into the pork business. Portion control involves a packer breaking down the carcass into even smaller units, such as individual steaks and roasts, than the industry has yet developed. Indeed, IBP believes it is a logical extension of the boxed beef technology to which IBP is committed–but it is perhaps 10 years away. And IBP's pork facilities consist of one plant, acquired in 1976, which kills (exclusively under contract with Armour) Only 1.4% of the nations pork slaughter.

In addition to his "revelation" of IBP's game plan to dominate the beef packing, retailing, and pork industries, Bagley described certain incidents which he thought would be embarrassing to IBP. These incidents are ancient history and, in any event, are no better than scandal sheet gossip.

Processing Fee and Yield

Bagley implied (but would not state unequivocally, under questioning by Congressmen Richmond and Evans) that IBP had engaged simultaneously in the impossible feat of both predatory pricing and customer gouging. He claims this is done by quoting a below-cost processing fee but at the same time understating the primal yield in its Cattle-Pak pricing formula. ("Cattle-Pak" is IBP's trademark for the four primal cuts — loins, ribs, rounds and chucks — sold in boxes as a unit with the price determined by adding the quoted market price of a carcass plus a fee for selection and processing and minus a credit for unwanted fat, bone, and other "thin meats" retained by IBP.) Because the formula and the role of the primal yield are complex, Bagley was able to conceal the truth in confusion, and it was evident from your own comments and questions that you did not understand the issue. We shall try to elucidate.

The Cattle-Pak pricing formula is necessarily constructed around assumptions and averages because all cattle — like all people — are different. For example, it is assumed that the average carcass will weigh 650 lbs. and that it will yield a certain percentage of salable primal cuts versus the total carcass. The primal yield percentage used in constructing the formula price per pound of actual primal weight shipped may or may not be attained in practice due to cattle and production variations. In effect, IBP guarantees its customers a firm price/cwt. on its Cattle-Pak cattle, the price guarantee necessarily being based upon an assumed, stated yield. The average actual yield attained in production depends on 2 factors: the average characteristics of the carcasses (and, therefore, the cattle) procured for processing and the efficiencies achieved in production. If the average actual yield over time should exceed the assumed yield used in the formula, IBP's anticipated gross margin available to cover processing costs and profit will increase; but if the actual yield is less than the assumed yield, the gross margin will shrink — and IBP takes that risk. In either case, the customer is no worse off because he knows what the stated yield is in the formula, and either buys IBP Cattle-Pak or buys from someone else according to whether he is satisfied or dissatisfied with the price/cwt. which results from the stated yield applied to the cost of the carcass plus the selection and processing fees. This is the free market at work.

As IBP has been able to improve its production techniques, and as leaner, better-yielding cattle have been fed by the nation's cattle feeders (stimulated in part by IBP's demand for cattle suitable for its boxing standards), IBP has been able to gradually raise its stated yields in the Cattle-Pak formula while keeping a reasonable processing fee in the face of rising labor and packaging costs:

Regular C/P

Date	Primal Yield	Packaging & Processing Fee (Per Head)
1970	61.1%	$30.70
November 1971	61.1	31.50
December 1972	61.1	32.58
September 1973	62.5	32.58
June 1974	64.5	38.18
February 1976	64.5	34.84
July 1978	65.0	34.84

If IBP's stated yields were somehow "fudged" (a term coined by Bagley) to disadvantage customers, it seems very strange that, when Bagley joined Spencer Foods, Inc. in the fall of 1975 as Executive Vice President in charge of boxed beef production, he there installed boxed beef programs and stated yields that were substantially copies of IBP's programs and yields. Likewise, at Bagley's present employer, Dubuque Packing Company, there are startling similarities between IBP's "Cattle-Pak" and Dubuque's "Dupac" programs, even extending to sales literature that tracks IBP's almost word for word, a processing fee identical to IBP's ($34.84), and a yield identical to IBP's (65%). (See e.g., the attached sample Dubuque form entitled "DUPAC CATTLE PRICING REGULAR CATTLE.") Indeed, Dubuque became so cavalier about literally copying IBP's formula pricing forms it has forgotten to white-out or otherwise change such terms as "IBP Trim" and IBP's registered trademark "Cattle-Pak" (see the other attached sample Dubuque form), and as a result IBP recently had to caution Dubuque about trademark infringement.

Because of the interrelationship between the yield and the processing fee in the Cattle-Pak formula, it was possible in 1976 to reduce the fee from $38.18 per head (which Bagley himself had advocated in June, 1974) to $34.84, even though the estimated cost of fabrication was $38.01.* Indeed, this was necessary because the formula Bagley had persuaded IBP to adopt in 1974 raised the cost of Cattle-Pak and constructed a price umbrella for competitors which, over time, stifled further growth of Cattle-Pak sales. When, in late 1975, IBP's Formula Pricing Committee tried to analyze why Cattle-Pak sales had declined, they found that (See your Exhibit 39a) —

> " • • • customers buying straight carcasses [formula Cattle-Pak] were being penalized and customers buying [negotiated] pieces were being rewarded. Our current formula acts as a disincentive to buying straight carcasses. Most of our customers have figured this out and can often put the pieces together at less than the cost of straight carcasses • • •."

Thus, the February, 1976 reduction in fee was necessary to restore customer confidence in the economics of Cattle-Pak, but was not below cost because, as Exhibit 39a also indicates, "a portion of any [anticipated] yield advantage [was used] to reduce the formula [processing fee]."

Bagley's self-contradictory suggestion that the fee was *apparently* below cost and predatory but the yield was understated, and that, therefore, the price was overstated, is of

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*In this context it should be noted that the selection fee of $.75/cwt., or $4.88 on a 650 lbs. carcass, when added to the $34.84 processing fee, by itself produces total revenue of $39.72, or $1.71 *more* than the estimated cost of fabrication. This alone is dispositive of any allegations of sales of Cattle-Pak cattle below cost.

course absurd: the Cattle-Pak price cannot be simultaneously too high and too low because the yield and fee must be considered together as part of an integral formula. That produces that bottom line price which customers evaluate. In fact, the 1976 formula fee reduction was calculated to produce an average price of $5 per head for IBP's processing and packaging services — a fact which we are proud to have the world know.

Bagley also emphasized Perry Haines' memo recommending that the fee reduction be significant enough to build Cattle-Pak volume by giving "our customer the lowest possible price for whole cattle." This necessarily meant taking business from competitors and, as his memo expressly states, this was not to be done by "predatory" or below-cost pricing, but *by pricing to IBP's own costs*, rather than to those of its inefficient competitors. Haines said: "If we price to our cost, the high cost marginal producer by definition will be forced to step aside." (He was, of course, referring only to the few competitors who sold a version of Cattle-Pak [not boxed beef pieces], which was the only product involved and constituted only 20% of IBP's boxed beef sales and far less of those competitors' boxed beef sales.) Bagley, too, recognized in his testimony that it was unwise for IBP to construct a formula which held an "umbrella" over higher cost competitors and that is exactly what Haines was trying to avoid.

Thus, once the history and relationship of the Cattle-Pak formula fee and yield are understood, IBP's constant attempts to keep the two in balance, and the fee reduction in 1976 to eliminate an imbalance created by Bagley's 1974 formula, make perfect competitive sense.

Waldbaum Cattle-Pak Formula Price

Although Bagley admitted that he did not know the origins or rationale of IBP's Cattle-Pak formula pricing to the Waldbaum chain, he felt free to suggest that it was illegal, below-cost pricing used by IBP as a tool to break into the New York market. The facts are otherwise.

1970 was a watershed year for IBP and boxed beef. IBP was just emerging from a bitter 9-month strike by the Amalgamated Meat Cutters at its principal processing plant in Dakota City, Nebraska. IBP's processing division was losing money and desperately needed volume to achieve cost efficiencies that would enable boxed beef to compete with carcass ("swinging") beef. The New York market had the greatest volume potential, but was effectively closed to IBP because of union resistance to prefabricated beef and retailer inertia coupled with fear of Union reprisals.

Bagley attempts to minimize the impact of Union opposition because he had been able to purchase some boxed beef when he was meat director for the Bohack chain from 1967 until he was fired in 1969. What Bagley did not tell you is that the boxed beef he was buying then was fabricated by journeymen butchers employed by *Chicago* and *New York* "breakers" — *not* by packers (like IBP) at point-of-slaughter using assembly-line processing techniques and less skilled, lower cost labor. (Although the Amalgamated represents both urban butchers and packinghouse workers, the bulk of its dues comes from the retail butchers and it therefore has always resolved its own internal conflict of interest in favor of its urban members by opposing in every conceivable way beef prefabricated at the packinghouse — even by its own members. The Union has also struck IBP plants — or otherwise been involved in labor disputes with IBP — 9 times in

the past 10 years, trying to force IBP to pay unnecessarily higher skilled butcher rates for assembly-line work.)

In any event, in 1970 IBP was unable to get any N.Y. chain to adopt its boxed beef program consisting of standing weekly orders of Cattle-Pak, supplemented by extra cuts when needed. This program provides a steady base load to support production efficiencies.

Finally, the Waldbaum chain was persuaded to work with IBP to develop a special fabrication suitable for the N.Y. market and to switch all of its stores away from carcass beef and onto the Cattle-Pak boxed beef program. This different, more boneless fabrication for Waldbaum (which ultimately became Eastern-style Cattle-Pak — not the other way around, as Bagley tells it) required a new formula, which was negotiated between C. J. Holman and Waldbaum's head meat man, Aaron Freedman, both now deceased. We do not know all of the details of their agreement, but we do know that later it was Waldbaum's position that Holman promised, in return for Waldbaum's commitment to pioneer the use of the Cattle-Pak program on the East Coast and endorse it publicly if it worked, that the service fees would *not* increase but would, if anything, decrease over time as production efficiencies were achieved. We also know that the Waldbaum fabrication *and* pricing formula was offered to — but initially *rejected by* — other N.Y. chains, specifically including Bohack.

As time passed, Waldbaum became a showcase example for the success of IBP's boxed beef program and other chains did accept Cattle-Pak. However, labor and packaging cost increases more than offset production efficiencies, forcing periodic increases in the service fees which Waldbaum did not pay because of Holman's initial commitment.

After Bagley joined IBP and discovered the discrepancy, he sought help from IBP's General Counsel William L. Heubaum early in 1973. He sought help not (as he says now) simply because he was concerned about the legality of the arrangement, but primarily because he wanted to improve the profit performance of the processing division by raising the Waldbaum price to the same level as other buyers. Heubaum accomodated Bagley by generating legal memos which warned of the consequences of violating the Robinson-Patman Act and were to be used to persuade Waldbaum to accept the current Eastern Cattle-Pak pricing formula. (The formula applied only to Cattle-Pak; it did not apply to Waldbaum's negotiated beef purchases, which, as Bagley admitted, accounted for more than half of its volume.)

Bagley's efforts to raise the Waldbaum formula were not confined to working with counsel. In April, 1974 (while he was an employee of IBP) he leaked confidential IBP documents which had been generated by accounting personnel in the summer of 1973 (to demonstrate the economic impact of the Waldbaum formula on IBP) to an informant who then sold the documents to Bohack's management for $6,000. Bohack's president threatened suit against IBP and exposure of the documents unless IBP paid money to bolster its faltering balance sheet. C. J. Holman refused, claiming that there was nothing unlawful about the Waldbaum arrangement, and told Bohack to do whatever it felt it had to do. After seeking the advice of prominent N.Y. antitrust counsel, Bohack's president apologized and the matter was dropped until three years later when Bohack, as a Chapter XI debtor-in-possession, switched from the grocery business to the litigation business, suing two of its former suppliers (IBP and Borden), certain directors, and Gulf and Western for various alleged wrongs. IBP was sued notwithstanding that it had

lost $212,000 as a result of Bohack's Chapter XI proceedings and, alone, had been willing to extend beef credit to enable Bohack to continue operating its stores after the Chapter XI petition was filed in July, 1974. Bohack's suit against IBP remains pending, and IBP expects to be able to prove that the Waldbaum arrangement was completely justified by the circumstances, was pro-competitive because it opened the New York market to boxed beef for *all* competitive packers, did not violate the technical provisions of the Robinson-Patman Act, and certainly did not cause Bohack's (or anybody else's) problems.

Your attempt to suggest that IBP's special pricing formula on *one* minor product in the New York market (Cattle-Pak) to *one* chain from 1971 to June, 1974 (when it was in fact terminated) was responsible for the current problems of such retail chains as A & P and Food Fair further demonstrates how absurd it is to resurrect the Waldbaum pricing question.

Quantity Discouts

Bagley's version of IBP's quantity discount program is absolutely false, and, we believe, constitutes perjury for which he should be cited. Moreover, the facts were available to you from the IBP documents which you seized — and yet you allowed Bagley to suggest that IBP had constructed and is still perpetuating an unlawful quantity disocunt program. The facts are as follows (citations are to the IBP documents which you introduced as Committee exhibits):

In mid-June, 1972, Bagley offered a quantity discount program on Cattle-Pak (only) to several retailers.* (Exs. 12 &

*Bagley offered this program to Safeway on June 19, 1972 — not in 1971, as he testified. Safeway did not adopt the Cattle-Pak

(footnote continued on next page)

13.) The discount was progressive, based on weekly volume — ranging from 50¢/cwt. for a minimum purchase of 500 head to $1/cwt. for 1,000 head or more. This program had been divised by Bagley himself and had *not* been submitted to IBP's legal department for review.

On June 21, 1972, Bagley wrote a memo instructing all processing sales people to offer the same program to "all accounts" — hardly consistent with Bagley's testimony that it was offered only to selected accounts. (Ex. 14.)

On July 11, 1972, Bagley's boss, Stanley Feldman, wrote Bagley a memo criticizing his description of the program because, for example, it did not apply to smaller accounts. (Ex. 15.) Thus, it was Feldman, not Bagley, who worried about the availability of the progam to the smaller customers.

On July 28, 1972, Bagley wrote IBP's former General Counsel, Gus Nymann, who had resigned (and therefor the memo came to Mr. Heubaum's attention) asking for legal help in answering the questions Feldman had posed to Bagley. Again, it was not Bagley, but Feldman, whose concerns were being expressed. Moreover, although Bagley's memo said "We *anticipate* offering the following discounts to customers" (underscoring supplied), the fact was that he had already done so. (Ex. 16.)

The matter was taken seriously and a large meeting of IBP executives (including C. J. Holman) was held on July 31, 1972 to discuss Bagley's request for advice. It was

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(footnote continued from preceding page)

program at that time because it was already centrally-processing its own carcasses; not because of a concern over the formula yield, as Bagley claims.

decided that the minimum weekly purchase requirement should be lowered from 500 head to 250 head and that (Ex. 17.) —

> "The availability of the discounts will be communicated to all customers having the potential of purchasing the quantities specified."

So far as we know, that was in fact done (except it was not offered to Waldbaum because it had its own contractual arrangement). If not, it was Bagley's fault because he was in charge of the program.

At the July 31 meeting, newly installed General Counsel Heubaum was directed to determine whether the discount program had to be offered to IBP's distributors (who had separate contractual arrangements) as well as retailers. Heubaum sought the help of outside antitrust counsel who advised that the retailer discount did not have to be offered to distributors, but in the process cautioned Heubaum that since Bagley had predicated his retailer discount program on volume production cost savings being passed on to the customer, it was important to document those savings meticulously in order to satisfy the evidentiary requirements imposed by Robinson-Patman interpretations of the FTC and the courts.

Beginning in August, 1972, IBP sales, production, and accounting people undertook to identify and quantify those areas of cost savings believed to be inherent in the volume purchases involved in the discount program. These were not simply efforts to build a file, as Bagley suggests; they were extensive, ongoing, bona fide efforts to document cost savings. You selectively chose to disclose certain confidential documents on this subject (Exs. 18-25.), but omitted others in your possession which show IBP's strenuous attempt to comply

with what it believed to be the law, including review by outside antitrust counsel of the economic justification materials being developed by IBP people.

On November 6, 1972, outside antitrust counsel advised Heubaum on their analysis of the cost justification materials received to date. Counsel concluded that while some areas of cost savaings looked promising as a basis for cost justification, more work had to be done to analyze and document each point. We wondered at first why you chose not to place this attorneys' letter in the public record, given your complete disdain for the integrity of other IBP privileged documents. But, on reflection, your reasons are clear: the memo not only demonstrates IBP's efforts to secure proper legal guidance, but also contains handwritten notes by Bagley *disagreeing* with counsel's conclusions that in some areas there was no cost justification potential. Indeed, Bagley himself always (until last week) expressed the belief that the discount program he had devised was cost-justified.

Heubaum forwarded outside counsel's letter to IBP executives on November 9, 1972, set up a meeting to discuss it, and said: "We should be prepared to discuss the questions posed in this letter." (Ex. 26.) IBP's people took outside counsel's advice to heart and continued to develop cost justification materials during the winter of 1972-1973.

On April 2, 1973, in a memo you also chose to omit, outside counsel reviewed in detail the cost justification materials which had been gathered to date and advised that still more work needed to be done, including a "detailed cost accounting study of IBP's operations" — probably by outside cost accountants. This, of course, was a massive and expensive undertaking that would have taken months.

On April 27, 1973, Heubaum relayed counsel's advice to IBP executives and recommended a long range cost accounting study, but, pending that, termination of the quantity discount program for Cattle-Pak. (Ex. 27.)

The program was suspended during the price freeze of August-September, 1973, and was in fact terminated on September 12, 1973, when it was feasible to do so coincidently with a change in the Cattle-Pak formula yield recommended by Bagley. This is clearly shown in the documents you and Bagley had available and there is no excuse for Bagley's waffling testimony that he was not sure how long the program continued or for his suggestion that it was still in effect in 1974 and 1975. (See Exs. 30-32.) Bagley was intimately involved in the termination of the program and his attempt to suggest that it was not then terminated is clear perjury.

Bagley again perjured himself by suggesting that the 143 rebate checks distributed by IBP's Lou Havrilla to customers in June, 1975 (Ex. 33.) had anything to do with the previous program or were somehow unlawful. As Bagley well knows, that occasion represented a special one-time price reduction program under which IBP rebated $8 per head to *all* customers purchasing *any* quantity of Cattle-Pak during the period May 26 to July 19, 1975. A copy of Bagley's own memo announcing this program is attached so there can be no mistake about this statement. This was not a continuation of — and had nothing to do with — the 1972-1973 program. It certainly was not unlawful by any conceivable standard and you have done serious harm not only to IBP, but also to 143 of IBP's innocent customers, by inserting their names in the record coupled with Bagley's false suggestion that they received illegal rebates.

Through the perversions of your process you have allowed Bagley to turn IBP's good faith efforts to justify to itself the

discount program Bagley *himself* had created and to comply with the price discrimination laws into a vicious attack on IBP and its customers. There is no conceivable legislative purpose that would justify the evil you and Bagley have perpetrated in the guise of righteousness. As you well know, the Packers and Stockyards Administration had full access to the documents concerning the Waldbaum and 1972-1973 quantity discount matters, investigated them thoroughly, and concluded that no action was warranted. The facts and documents equally available to you demonstrated why they reached that conclusion, but you chose to ignore them, and, instead, exploited Bagley's vindictiveness toward IBP in such a manner as to discredit the Congressional hearing process.

Bagley's Bias

We have demonstrated that Bagley's stories about illegal or questionable conduct by IBP are false.* What remains is to examine why he is actually making these accusations.

As you know, IBP is suing Bagley and others for breach — and inducement to breach — his contractual and fiduciary duties to IBP. Bagley has admitted that his disclosure of IBP confidential business information and documents was initially induced by Irving Stern. Stern was an International Vice President for the Amalgamated Meat Cutters

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*We have not tried to address in detail such irrelevant trivia as an alleged functional discount to IBP's Boston distributor some time prior to 1971 to help him introduce boxed beef into the Boston market, Wakefern's expressed desire to deal directly with IBP instead of its N.Y. sales agent in hopes of avoiding commissions, IBP's subsidy of three C. P. Sales' employees, and Holman's almost prophetic warning to Bagley that he had better plan on one plant being on strike at all times.

union and District Director of the New York region who had helped Bagley get a job with the First National supermarket chain after he had been fired by Bohack in 1969. (Bagley was subsequently fired by First National.)

In 1976 Stern served 4 months in jail for evading taxes on bribes — a situation that surfaced as a result of information given to government investigators by IBP's former New York sales agent. Stern was aggravated at IBP and asked Bagley if he was similarly aggravated and whether he knew of anything that could cause problems for IBP. Bagley said there were undoubtedly some things that had occurred during his 4 years at IBP, so Stern arranged a meeting between Bagley and Albert J. Krieger, the criminal lawyer (and not an antitrust lawyer) who had represented another union official who had been convicted along with Stern. Bagley disclosed IBP confidential documents to both Stern and Krieger, who wanted to start some kind of an antitrust suit against IBP and sought to interest (at least) the New York wholesale breakers, whose function had been threatened by direct IBP boxed beef sales, and Bohack, which was in Chapter XI and pursuing litigation against everyone in sight.

Bagley's current claim that he met with Krieger as a "starting point for my becoming involved in at least trying to prevent a massive take-over gby IBP of the packing industry" is simply a fabrication to conceal the malice with which he sought to stir up trouble for IBP and to create a defense for IBP's breach-of-fiduciary-duty suit. Bagley did not take his story and his documents to any responsible governmental authorities. Rather, he worked with Stern and Krieger to foment litigation against IBP. He also met with Jesse Prosten, the head of the Amalgamated's packinghouse-workers division, early in 1977, on the eve of a long strike at

IBP's Dakota City plant, and disclosed what he thought would be IBP's strike strategy. And he met with Hawkins in January, 1977 to show him IBP documents and help in Hawkins' antitrust litigation against IBP — even though his own employer, Spencer Foods, was a co-defendant. In all of these meetings Bagley voluntarily disclosed information and documents to IBP's antagonists; but when the Packers and Stockyards Administration's investigators asked to see the documents, Bagley insisted upon a subpoena, which belies his newly invented theory that he just wanted to stand up and be counted before IBP swallowed up its competitors.

As a result of this conduct, IBP in 1977 sued Bagley for breach of his fiduciary duties to IBP by stealing IBP corporate documents and misusing them to defame and stir up litigation against IBP.

Now, you have furthered his vendetta by providing him with a privileged forum in which to make his false representations and disclose confidential IBP documents and information. Bagley's testimony before your Subcommittee must be recognized as nothing but a malicious attempt to blacken IBP's name and belatedly manufacture a defense to IBP's breach-of-fiduciary duty suit.

But as bitter as he is, Bagley could not deny that IBP has the "best integrity in the industry" for quality and has never tried to short-weigh its customers. He also admitted that IBP has achieved its goal of being the lowest cost producer and that its committment to boxed beef has brought about a resolution in the industry which has benefited consumers while at the same time permitting IBP to pay more to producers for their cattle. Bagley says he was proud to have been a vice president of IBP for four years and, when pressed by Congressman Richmond, the worst he could say

about IBP was that "It's *possible* that they became a *little overzealous* in some of the things they are doing." (Underscoring supplied.)

Instead of accepting Bagley's vindictive accusations of IBP, you should be listening carefully to what he said under questioning by Congressman Evans:

> " • • • the history of this country is the guy who buys the best mousetrap should build a better mousetrap. I don't think you can penalize IBP for being progressive, hard-nosed in dealing with unions and getting favorable rates and running generally a good business.
>
> Now, whether or not we should subsidize inefficiency, I don't believe in that either."

The real message that emerges from your hearings is that not even Bagley can deny the benefits to cattle feeders, retailers, and consumers achieved through IBP's innovative approach to beef production and distribution.

• • • •

In sum, we believe that the various charges made against IBP during your hearings which you have so readily accepted are unsupportable and were made for ulterior purposes. We believe the responsible members of your Committee, the media, the beef industry, and the public will come to realize this and share our outrage at your procedures and motives.

We also would like them to ponder other significant questions of public policy and principle which your conduct of the hearings necessarily raises.

First, you have apparently lost sight of the fact that IBP was once — and not that many years ago — the type of

small business that you claim is your special concern. This company was founded in 1960 with the help of a $300,000 SBA loan which was repaid in 1962. Since then, through the hard work and ingenuity of our founders and all the men and women who have worked here through the past 19 years, we have become the largest and most successful beef packer in the world and have been instrumental in instituting innovations which have saved consumers many millions of dollars. We did not reach this position by cheating our suppliers or customers, but rather by treating producers fairly and turning out a quality product at a fair price geared to our costs. Instead of attacking us, you would be better advised to use IBP as a model of what small business can achieve. We place great trust in the common sense of the American public not to allow their governmental representatives to punish efficiency and business success.

Second, we fear that the press in this case has thus far (with isolated exceptions) failed in its function of critically assessing all aspects of your investigation and instead has simply repeated whatever has been said in your hearings because it has been "good copy" and because this industry is so difficult to comprehend. Although the press has resented past efforts by other governmental officers to manipulate the news for political or other ends, that is precisely what has occurred here.

Finally, we are disturbed by the ability of one member of Congress to transform the traditional congressional function of publicly funded investigations into a one-man vendetta against a public corporation and its shareholders. We realize that it has happened before and will no doubt happen again, but we are not yet cynical enough to believe that it should simply be tolerated and cannot be stopped. We have been

encouraged by the sincere efforts of your Subcommittee colleagues to cut through the accusations made against IBP to determine what the facts really are. However, because of your demonstrated ability and willingness to manipulate the Subcommittee proceedings, we are declining to appear before you at this time.

Yours very truly,

IOWA BEEF PROCESSORS, INC.

By /s/ Robert L. Peterson
Robert L. Peterson,
President

jf
Enclosures

cc: Hon. Berkley Bedell
Hon. Douglas K. Bereuter
Hon. Ed Bethune
Hon. Charles J. Carney
Hon. William S. Cohen
Hon. Silvo O. Conte
Hon. Billy Lee Evans
Hon. James M. Hanley
Hon. Richard H. Ichord
Hon. Joseph A. LeFante
Hon. Dan Marriott
Hon. Joseph M. McDade
Hon. Henry J. Nowak
Hon. Dan Quayle
Hon. Frederick W. Richmond
Hon. Fernand J. St. Germain
Hon. Thomas J. Tauke

Congressman Neal Smith
August 1, 1979
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DUPAC CATTLE PRICING

REGULAR CATTLE

	6/7 CHOICE YIELD/LBS	PRICE/CWT		6/7 UNGRADED YIELD/LBS	PRICE/CWT	
CATTLE	650 @	_____	= _____	650 @	_____	= _____
PROCESSING & PACKAGING FEE		+34.84 (same as IBP)			+34.84	
SUB-TOTAL		_____			_____	
THIN MEAT CREDITS:		FOB PLANT			FOB PLANT	
Brisket Bnls	16.71 @	_____	=	17.39 @	_____	=
Shank Meat	16.71 @	_____	=	16.98 @	_____	=
Inside Skirts	2.92 @	_____	=	2.92 @	_____	=
Outside Skirts	2.92 @	_____	=	2.92 @	_____	=
Flank Steaks	2.73 @	_____	=	2.73 @	_____	=
Kidney	1.30 @	_____	=	1.30 @	_____	=
Hanging Tenders	1.63 @	_____	=	1.63 @	_____	=
Short Ribs	4.52 @	_____	=	4.52 @	_____	=
Special Trim	2.72 @	_____	=	2.72 @	_____	=
Regular Trim (50/50)	80.16 @	_____	=	81.35 @	_____	=
Fat & Bacon	88.68 @	_____	=	83.29 @	_____	=
Floor Scrap	3.25 @	_____	=	3.25 @	_____	=
Cutting Loss	3.25 @	XXXXXX	=	3.25 @	XXXXXX	=
TOTAL CREDITS	227.50	(_____)		224.25	(_____)	
TOTAL PRODUCT COSTS		_____			_____	
DIVIDED BY YIELD	422.50 ÷ 650 = 65% (same as IBP)			425.75		
PRICE FOB PLANT		_____			_____	

CUTOUT/CWT (MEMO NOTE)

Top Half Sheet
River Points
Choice Steers Plus $0.75/cwt.

Top Half Sheet
River Points
Choice Steers Plus $0.75/cwt.

Congressman Neal Smith
August 1, 1979
Page Forty-three

DUPAC CATTLE PRICING

BNLS CHUCK/BNLS ROUND CATTLE-PAK 1/2 O. RIBEYE

	6/7 CHOICE YIELD/LBS	PRICE/CWT	FOB PLANT	6/7 UNGRADED YIELD/LBS	PRICE/CWT	FOB PLANT
CATTLE	650 ×	_____	= _____	650 ×	_____	= _____
PROCESSING & PACKAGING FEE			+34.84			+34.84
SUB-TOTAL			_____			_____
THIN MEAT CREDITS:						
Brisket Bnls	16.71 ×	_____	=	17.39 ×	_____	=
Shank Meat	7.93 ×	_____	=	8.32 ×	_____	=
Inside Skirts	2.92 ×	_____	=	2.92 ×	_____	=
Outside Skirts	2.92 ×	_____	=	2.92 ×	_____	=
Flank Steaks	2.73 ×	_____	=	2.73 ×	_____	=
Kidneys	1.30 ×	_____	=	1.30 ×	_____	=
Hanging Tenders	1.63 ×	_____	=	1.63 ×	_____	=
Short Ribs	4.52 ×	_____	=	4.52 ×	_____	=
Spare Ribs	7.15 ×	_____	=	7.15 ×	_____	=
IBP Trim	6.44 ×	_____	=	6.44 ×	_____	=
Regular Trim	92.19 ×	_____	=	92.04 ×	_____	=
Fat & Bone	129.72 ×	_____	=	125.57 ×	_____	=
Floor Scraps	3.25 ×	_____	=	3.25 ×	_____	=
Cutting Loss	3.25 ×	XXXXXX	=	3.25 ×	XXXXXX	=
TOTAL CREDITS	282.66		(_____)	279.43		(_____)
TOTAL PRODUCT COSTS			_____			_____
DIVIDED BY YIELD	367.34			370.57		
PRICE FOB PLANT			_____			_____

CUTOUT/CWT (MEMO NOTE)

Top Half Sheet
River Points
Good Steers Plus $0.75/cwt.

Top Half Sheet
River Points
Choice Steers Plus $1.00/cwt.

To: All Regional Managers
Regional Consultants
Telephone Salesmen

From: Hughes Bagley and Bernie Knight

SPECIAL SALES PROGRAM

May 26 - July 19 8 weeks.

With the Amarillo plant coming on stream IBP has the capacity to promote beef for our Cattle-Pac customers at a time when they, our customers, can best use our help, at the rather high current cattle market.

(1) Starting with shipments of week of May 26 thru July 19, IBP will pass along a discount of $8.00 per head to *ALL* purchases of C/P Cattle (prime, choice, no-roll, and IBP Finest).

(2) C/P Cattle will be priced as per each day's formula. Discount will be accumulated and paid every 4 weeks. (2 times).

(3) This program should be presented as follows:

Rounds — ribs — chux — Figure formula. $8.00 discount on loin where customer needs. This is almost 10¢ a lb. on loin.

IBP customers will be able to afford stock sales when it counts plus build their volume and ours.

(4) $8.00 per head is $648.00 per load of S1 C/P Cattle.

Only C/P Cattle on this program, no extra cuts.

START CALLING Tuesday, May 20 for orders to ship week of May 26.

No quantity is required, only the purchase of whole C/P Cattle.

Hughes A. Bagley

HB/ds
File: 53

86-956

No. 86-5433

Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

IBP, INC.,

Petitioner,

v.

HUGHES A. BAGLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. RAWLINGS
MICHAEL P. JACOBS
KINDIG, BEEBE, RAWLINGS,
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STATEMENT OF THE CASE

This controversy does not really begin with the hearings in 1977 before the Subcommittee on General Small Business Problems of the U.S. House of Representatives Committee on Small Business ("Subcommittee") as IBP states in its Petition for a Writ of Certiorari. Rather, it relates back to a time even before Hughes A. Bagley's employment with IBP. It begins with the misrepresented yields in the IBP Cattle Pak pricing formula in the late 1960s, IBP's peculiar preferential pricing arrangement with the Waldbaum chain of supermarkets which a jury found to be in violation of the Robinson-Patman Act, the circumstances surrounding IBP's entry into the New York boxed beef market, IBP's quantity discount program in the 1970s, and its termination of Bagley's employment in July, 1975.

This controversy goes back to those days because, in describing Bagley's testimony as it pertained to those events and/or subjects, IBP, in its defamatory letter stated that Bagley's testimony was ". . . malicious—even perjurious . . . ", it was ". . . distortions of the truth . . . ", it ". . . conceal[ed] the truth in confusion . . . ", the " . . . facts are otherwise . . . " and " . . . Bagley's stories . . . are false." (App. 66, App. 71, App. 87, App. 92, and App. 100).[1] Plainly, those events as they unfolded are relevant,

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[1]The references herein are to the Appendix in Bagley's Petition for Writ of Certiorari, No. 86-921 rather than to the Appendix for IBP's Petition for Certiorari, because the pagination of the letter in the latter Appendix is erroneous and inconsistent with the trial record. Moreover, it should be noted that Page F-1 of IBP's Appendix is not part of the original letter as published by IBP and was apparently added as an afterthought for purposes of its petition.

essential, evidence in a trial to prove the falsity of IBP's defamatory letter.

This case goes back to the time of Bagley's firing in July, 1975, because Bagley was told at that time by an executive vice president to pack his files and leave. (Tr. 295-296). Bagley packed his files with the assistance of other IBP officers, and was observed by the vice president who had fired him. (Tr. 300-303; 1019-1022). Bagley did so as many other ex-officers of IBP had done when they left IBP, including Robert Peterson, the President of IBP and the signator of the defamatory letter, when he left IBP in the late 1960s. (Tr. 1142-1143). Finally, Bagley's actions in doing so were implicitly recognized by IBP's then general counsel as being consistent with the custom and habit of other officers of IBP. The General Counsel acknowledged this custom and habit when he described IBP's inability to produce a subpoenaed document in 1975 because several officers of IBP had since left IBP and taken their documents with them. (Tr. 2135-2136). These facts prove that IBP acted with "knowledge of falsity" when it said Bagley had stolen documents.

The focal points of the libel claim are each of the events identified in IBP's defamatory letter which characterized Bagley as an untruthful or unreliable person, to-wit: the misrepresentation of yields in the Cattle Pak pricing formula, the special preferential pricing relationship with Waldbaum, IBP's entry into the New York market, the quantity discount program, and the circumstances surrounding Bagley's removal of his documents from IBP when he was fired. IBP's letter defames Bagley in its

account of each of those events. Proof of a compensable libel as to any one of them is sufficient to affirm the libel judgment in favor of Bagley. Thus, the focal point of this case is not only the subcommittee hearing which was really nothing more than a collateral coincidence to the events as they were unfolding and, in the eyes of IBP, an opportunity to manufacture its claimed privilege.

In the Fall of 1976, Bagley became aware of the contents of a 1975 IBP formula pricing committee document because a then co-employee of his at Spencer Foods, Hans Aarsen, had taken his copy of the formula pricing committee documents with him when he left IBP in 1975. These ("Aarsen") documents explicitly revealed IBP's intent to price its product so as to force its competitors out of business. (Tr. 311-311A; 402-415, Bagley Exhibit 16).

Bagley, in November, 1976, was requested to meet with lawyers investigating IBP anti-trust activities. Bagley agreed to meet with those lawyers only after being assured by them that he could not withhold or cover up evidence of illegal activities. (Tr. 323-324; 415-420; 1709-1721; 1752). In those meetings, he explained only the documents that were necessary to understand IBP's pricing formula and how it could be used to effectuate IBP's stated objective of pricing its competitors out of business. (Tr. 325-330; 1726-1741). Thereafter, Bagley, under subpoena, produced the same documents to the Congressional subcommittee investigators. (Tr. 438; 478-483). Bagley never sought an audience with anyone; he never held a press conference or issued a press release concerning his knowledge or documents; and he never publicly or privately sponsored, supported, or advocated any legislation designed to affect the beef industry.

At the time of Bagley's testimony before the subcommittee, he was an employee of Dubuque Packing Company. At that same time, Dubuque and IBP had a business relationship. After Bagley had been subpoenaed by the subcommittee but before he testified, IBP, through three different officers, told Dubuque it was not happy doing business with Dubuque while Bagley was in its employ. (Tr. 490-91; 1686-87; 1813-1834; 2077-79). Bagley was fired by Dubuque within a week after after his Congressional testimony. (Tr. 492-496). The defamatory letter, dated August 1, 1979, was distributed by IBP beyond the membership of the subcommittee several days thereafter. (Tr. 712-721; Bagley Exhibit 12). Prior to his firing at Dubuque, Bagley had been constantly in demand within the beef industry because of his reputation, skill and expertise, but he was unable to find employment thereafter because he had been effectively blacklisted by IBP. (Tr. 386-397; 496; 503; 507; 587-588; 634-636).

Bagley then filed suit against IBP. In his suit, Bagley alleged and sought both compensatory and punitive damages for libel, invasion of privacy, tortious interference with employment, tortious interference with future or prospective employment and abuse of process. The genesis of the abuse of process claim was a 1977 lawsuit filed by IBP against Bagley and others alleging several million dollars in damages for injury to its business and reputation and seeking injunctive relief. (Bagley Exhibit 32). That 1977 case had been resolved by settlement and/or by voluntary dismissal as to all of the defendants except Bagley and as to all the claims against Bagley except the claim for injunctive relief. Bagley's abuse of process claim against

IBP was dismissed by the District Court prior to the commencement of the trial. IBP's 1977 lawsuit for injunctive relief against Bagley was consolidated for trial with the four remaining claims by Bagley against IBP, and both parties presented all relevant evidence in the prosecution and defense of these various claims.

The primary emphasis of the libel claim was on the IBP statements that Bagley "had stolen" and had committed perjury because those statements were the most outrageous, the most harmful, the most malicious, the most untruthful and, the easiest to prove. The libel claim, however, was not limited to those two remarks; nor was it limited to the original publication or distribution of the defamatory letter. Rather, the libel claim encompasses all of the libelous remarks about Bagley contained in the letter and includes each time the defamation was republished or redistributed.

Evidence in this consolidated trial included evidence of common law malice in support of Bagley's claim of punitive damages in his tortious interference claims. It was in this context that the trial took place. The jury returned separate verdicts for Bagley on each of his four counts, and the trial court entered judgment in favor of Bagley on three of the four claims pursuant to its ruling on post-trial motions, filed June 24, 1983.

On appeal to the Eighth Circuit, the libel judgment in favor of Bagley was reversed, the intentional interference with contract judgment affirmed, and the intentional interference with prospective contracts judgment conditionally affirmed. On December 2, 1986, Bagley filed his petition for a writ of certiorari as to the libel claim only. On December 9, 1986, IBP filed its petition for writ of certiorari.

ARGUMENT

I.

UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT THE FIRST AMENDMENT DOES NOT REQUIRE A PRIVATE-FIGURE LIBEL PLAINTIFF TO PROVE NEW YORK TIMES ACTUAL MALICE IN ORDER TO RECOVER COMPENSATORY DAMAGES.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) the Supreme Court clearly enunciated the Constitutional limitations applicable to a private-figure plaintiff where the publication involved matters of public importance. IBP now claims that *McDonald v. Smith*, 472 U.S. —, 86 L.Ed.2d 383, 105 S.Ct. 2787 (1985), stands for the proposition that if a First-Amendment right to petition is involved, rather than other First Amendment rights or guarantees, then a defamation defendant is always afforded the protection of the *New York Times* actual malice standard, and the status of plaintiff as a private or public figure is of no consequence. There is no basis for such a distinction, and the issue has been decided by the Supreme Court consistently with the en banc decision of the Eighth Circuit.

In *McDonald, supra,* both the majority opinions of Chief Justice Burger and the concurring opinion of Justice Brennan conclusively establish that the First Amendment right to petition is afforded no higher status than other First Amendment freedoms. As Justice Burger stated, in *McDonald:*

> These First Amendment rights are inseparable, [citation] and *there is no sound basis for granting greater Constitutional protection to statements made in a peti-*

> *tion to the President than other First Amendment expressions. McDonald v. Smith,* 86 L.Ed.2d at 3930. (Emphasis supplied).

Justice O'Connor, writing for the majority in *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. —, 89 L.Ed.2d 783, 792, 106 S.Ct. 1558, (1986) stated that:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern, but the plaintiff is a private figure, as in *Gertz,* the Constitution still supplants the standard of the common law, but the Constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.

Thus, the Supreme Court decisions in *McDonald* and *Hepps,* reaffirm the *Gertz* distinctions between public and private defamation plaintiffs. The Supreme Court in *Gertz* concluded that states should be given significant leeway in providing a legal remedy to the defamed private individual. The Supreme Court thus left states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. *Gertz* also stands for the proposition that the focal point is the status of plaintiff in determining the applicable First Amendment rights to be afforded in a libel action.

To accept IBP's position would amount to a departure from all Supreme Court decisions since *New York Times* to *Gertz* to *Hepps.* The Eighth Circuit correctly applied the Constitutional principles established by the Supreme

Court in construing *McDonald v. Smith, supra.* Therefore, IBP's petition for certiorari as to this issue should be denied.

II.

THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT BAGLEY WAS A PRIVATE FIGURE.

IBP asks this court to focus on purely private matters in determining whether Bagley was a private or public figure in the context of this libel litigation. The only public issue or controversy involved here is the Congressional hearing in which Bagley was subpoenaed and testified. Bagley in no way thrust himself into any public controversy. He was merely a witness subpoenaed by Congress to testify and tell the truth.

A close reading of the dissent of Judge Fagg in the panel decision of *Bagley v. IBP,* 755 F.2d 1300, 1321 (8th Cir. 1985) demonstrably illustrates the basic reasoning as to why Bagley was determined to be a private figure in the context of this libel action. As Judge Fagg noted:

> A mere witness can hardly be said to play 'an influential role' in 'resolving' a particular controversy . . .

Judge Fagg also prophetically points out that to turn a mere witness into a public figure because of his testimonial appearance is

> remarkably harsh and ignores the valuable role [this individual] play[s] in our legislative process. This result [making him a public figure] will discourage citizens with relevant information from coming forward and, as a consequence, Congress will likely be deprived of a valuable source of information. *Bagley supra,* at 1321.

Bagley met with several attorneys investigating anti-trust activities in late 1977 and early 1978. These attorneys requested and obtained meetings with Bagley relevant to IBP's predatory pricing and other potential anti-trust activities previously carried on by IBP. These interviews involved purely private litigation and did not involve public issues or controversies. IBP learned of these private meetings and instituted suit against Bagley, the various lawyers involved and others. IBP, by instituting such an action, is not entitled to transform Bagley into a public figure through such litigation.

IBP's Petition for Certiorari as to this issue raises no controversy that should be subject to review by this court.

III.

AN INDEPENDENT REVIEW OF THE RECORD SUPPORTS THE TRIAL COURT'S JUDGMENT.

As Judge Fagg noted in his dissenting opinion in the panel decision:

> . . . After an independent review of the evidence [citation], I conclude that Bagley presented clear and convincing evidence of actual malice, *Bose Corp. v. Consumers Union of the United States,* 104 S.Ct. 1949, 1967 (1984). *Bagley, supra,* at 1320.

Bagley denies that the Eighth Circuit committed any error with regard to an independent de novo review. A de novo review supports the jury's determination of actual malice.

Bagley need only prove one false defamatory statement to be entitled to recovery, and if he proved any such

statement was published with actual malice, he is entitled to recover punitive damages under *Gertz*. A de novo review will establish that there was substantial evidence of actual malice. Further, an independent review will support the determination that Bagley was a private figure; that IBP's statements as against Bagley were false; that IBP knew that its libelous statements concerning Bagley were false; and that Bagley proved fault and falsity in the trial court.

With regard to the evidence introduced in the trial to prove actual malice, Bagley, by way of example, and not inclusively, cited to the Eighth Circuit and would cite to this Court, the following testimony:

1. Officers of IBP assisted Bagley in packing his documents and taking them with him. (Tr. 1034; 1142-45).

2. Officers of IBP testified that it was the custom and practice of officers who left the employ of IBP to take their documents with them. (Tr. 1259-65; 1300-1310; 1329-34; 970-74).

3. The general counsel of IBP acknowledged that it was the practice of officers to take documents with them when they left IBP's employ. (Tr. 2135-36).

Based upon this record, the jury rightfully found clear and convincing evidence of actual malice, since IBP, acting through its corporate officers, knew that Bagley had not stolen any documents.

A similar de novo review of the record with regard to IBP's allegations that Bagley lied and perjured himself when testifying before Congress will show that IBP knew such statements to be false. The documents generated by

officers of IBP while in the employ of IBP are in and of themselves sufficient proof to show actual malice on the part of IBP.

Bagley once again urges the Supreme Court to grant certiorari to review the issues submitted in Bagley's Petition for Writ of Certiorari. Upon review by the Supreme Court, Bagley would anticipate and welcome an independent review of the entire record under the directions of *Bose, supra.*

IV.

THE PARTIES IN THIS LITIGATION HAD A FAIR TRIAL.

In Sections IV and V of its Petition, IBP complains that it did not receive a fair trial. IBP misconstrues the opinions of the Eighth Circuit when it suggests that it left this issue unclear. (See P. 11 of IBP's Petition). Both the panel and the en banc court expressly rejected IBP's protestation that it was the victim of an unfair trial. There were no dissenters in the Eighth Circuit to this conclusion.

In the libel case, the dominant issues were whether Hughes Bagley was a liar, a perjuror and a thief and whether IBP falsely and knowingly accused him of such in its defamatory letter. The dominant issue in the tortious interference claims was whether IBP acted intentionally, maliciously and wantonly. By the very nature of the claims, the evidence presented was necessarily volatile. *Curtis Publishing Co. v. Butts,* 351 F.2d 702, 714 (5th Cir. 1965), Aff. 388 U.S. 130, 18 L.Ed.2d 294, 87 S.Ct. 1975 (1967); *Arnold v. Eastern Airlines, Inc.,* 681 F.2d 186, 198 (4th Cir. 1982).

There was no error in the trial court, the Eighth Circuit has unanimously held that there was a fair trial, and IBP's Petition for Writ of Certiorari as to this issue should be denied.

———o———

CONCLUSION

For all of the foregoing reasons, IBP's Petition for Certiorari should be denied.

Respectfully submitted,

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